No. 80-6397

In The

Supreme Court of the United States

October Term, 1980

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SUPREME COURT, U.S.

RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondents.

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Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

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QUESTIONS PRESENTED FOR REVIEW

1. Shall the rule of Payton vs. New York, 445 U.S., 100 Supreme Court 1371, 63 L. Ed 2d2 639, be applied to Petitioner's case, where petitioner's application for a writ of certiorari on the same grounds was pending in this Court at the time Payton was decided?

2. Where police break into Petitioner's motel room to arrest Petitioner, knowing the occupants to be asleep, without giving notice of their presence and authority and within giving the occupants an opportunity to admit them and where the police rely on the claimed exigencies of the presence of a dog (which was not on the premises) and of the possibility that the occupants might be armed, was Petitioner's arrest unconstitutional?

3. Where Petitioner and his companions went to Florida soon after the murder of a courier, whose job had been held by Petitioner and where the main connection of Petitioner to the crime is that one of his companions had been seen near the courier's bank at least one-half hour before the courier set out for the bank, did the police have probable cause to arrest Petitioner without a warrant.

4. What are the rights of pre-Payton defendants should this Court not apply Payton retroactively?

5. Did the police have exigent circumstances to effect the warrantless arrest of Petitioner in his motel room?

6. Where evidence is seized in violation of the rule of Chimel vs California, may it and the fruits thereof be received in evidence because giving rise only to "faint prejudice" to Petitioner rather than of no effect beyond a reasonable doubt?

7. Where the police thoroughly searched the motel room including the closets, drawers, and chests, and seize every item (but one) belonging to the occupants, have the occupants been subjected to an unconstitutional general search?

8. Where the Court uses truthfulness as a criterion for determining the voluntariness of Petitioner's confession, should the decision that the confession was given voluntarily be reversed?

9. Where the police had the Lincoln automobile under surveillance for four days, having searched the car under a warrant on the first day, may they search the car again on the third day without obtaining a new warrant?

10. Is the second search of the Lincoln improper as part of an unconstitutional general search?

11. May the police seize the Lincoln on the fourth day of surveillance without obtaining a warrant to do so?

12. Should Petitioner's confession and the evidence seized in the foregoing searches and the fruits thereof be suppressed?

13. Should this Court grant the petition notwithstanding it was served more than 60 days after denial of leave to appeal to the Court of Appeals of the State of New York?

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1. This case squarely presents the question whether the rule of Payton vs. New York, 445 U.S. , 100 S. Ct. 1371, 63 L Ed. 2d, should be applied to those cases which were on direct appeal at the time of this Court's opinion. 10

2. This case squarely presents the question of the definition of the constitutional limitations on noticeless entries to effect arrest, and thus raises an important question of Constitutional Law which, to date, has not been, but should be, decided by this Court. 11

3. (a) The decision below demonstrates the continuing reluctance of New York Courts to abandon the reasonable suspicion standard of People vs. Morales, 22 N.Y. 2d 55, reversed sub. nom. Morales vs. N.Y., 396 U.S. 102, and to adopt the requisite standard of probable cause; (b) the absence of probable cause in this case is so egregious as to warrant intervention of this Court. 16

4. Even if Petitioner is not entitled to the benefit of Payton vs. New York, his conviction should be reviewed and reversed. 18

5. The Appellate Division concedes that the motel search violated the rule of Chimel vs. California, 395 U.S. 752, but justifies the search and receipt of the items seized into evidence on the basis of the confession which followed and is a product of the search. Such a ruling violates fundamental rulings of this Court and warrants the corrective review of this Court. 21

6. This Court should review the decision below because the Appellate Division refused to suppress the fruits of a general search in violation of principles long and clearly enunciated by this Court. 22

7. The decision below gives this Court an opportunity to reaffirm a principle so basic that it is rarely stated and oft forgotten: that truthfulness is not an element of voluntariness. 23

8. This Court should review this case because the Courts below have failed to follow the mandates of this Court concerning multiple searches. 25

9. We urge that this Court should review this case because the lower Courts were so enthralled by defendant's confession that the entire proceedings were distorted so that constitutional issues were decided in general in violation of existing principles denying petitioner a fair hearing. 26

10. This Court should grant the writ notwithstanding the application was filed more than 60 days after denial of leave to appeal to the Court of Appeals of the State of New York. 26A

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No.

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Supreme Court of the United States

October Term, 1980

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RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

---

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

The petitioner, Richard Graham, prays that a writ of certiorari issue to review the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dated and entered on August 13, 1980, which became the final decision of the highest Court of the State by virtue of denial of leave to appeal to the Court of Appeals of the State of New York, rendered on December 26, 1980, by the Hon. Lawrence H. Cooke, Chief Judge of the State of New York. Review is sought to the extent the order of the Appellate Division affirms the judgment of conviction for intentional murder 2d (Penal Law §125.25[1]) and felony murder 2d (Penal Law §125.25[3]).

OPINIONS BELOW

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (Appendix A) is reported at A.D. 2 , 431 N.Y.S. 2d 209 . The prior opinion of the Appellate Division, Third Judicial Department (Appendix B) is reported at 69 A.D. 2d 544, 419 N.Y.S. 2d 290. The opinion of the Sullivan County Court denying

the suppression motions of Petitioner and Richard Lucas, the motions having been heard together, (Appendix C) is report at 90 Misc 2d 1019, 396 N.Y.S. 2d 966.

JURISDICTION

The order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, was dated and entered on August 13, 1980. Copy of the order is attached hereto as Apperdix D.

Leave to appeal to the Court of Appeals of the State of New York was denied by certificate of the Hon. Lawrence H. Cooke, Chief Judge of the State of New York, dated and mailed December 26, 1980. Copy of the certificate is attached hereto as Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## STATUTES INVOLVED

N.Y. Criminal Procedure Law
§120.80(4) (b):

§120.80 Warrant of arrest; when and how executed.

xxxx

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

xxxx

(b) Endanger the life or safety of the officer or another person;

N.Y. Criminal Procedure Law
§140.15(4):

140.15 Arrest without a warrant: when and how made by police officer.

xxxx

4. In order to effect such an arrest, a police officer may enter premises in which he reasonable believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

FACTS

At 8:00 a.m. on October 19. 1975, Petitioner was asleep in his bed in his motel room in Fort Lauderdale, Florida. Immediately thereafter, officers of the Florida Division of Criminal Investigation and the Broward County Sheriff's Office, accompanied by New York State Troopers, broke into his room, with pistols drawn, and arrested the defendant for the murder, kidnapping, and robbery of one Craig Mitton, which allegedly took place on October 13, 1975. (R/A 287, 400, 409-10)*

The police entered defendant's room without any notice of any kind, gaining entry by use of passkey obtained from the motel management. (R/A 341, 400)

The police had no warrant for the arrest of defendant. No warrant had been issued and no Court proceedings had been initiated. A warrant was not issued until the next day. (R/A 429)

Police also arrested the deferdant's "fiancee" who was in the room with him. She was arrested for the same crimes. (See p. 48 infra; R/A 473, T1706)

In the adjoining room, the policy under similar circumstances arrested one Richard Lucas and his girlfriend, Cheryl Kilb. (See page 44, infra; R/A 345-7, 396, 497-9, T1706)

The police had had the motel rooms under constant surveillance since about 11:00 a.m. on the previous day. (R/A 277, 397-8)

During the surveillance the police occupied the rooms on either side of Graham and Lucas. Each police room had a connecting door with one room of Graham or Lucas, whose rooms did not interconnect. The only other egress from the rooms was on to a

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*References are to the record on appeal, which is numbered in two sequences. The suppression hearing pages are numbered starting at R/A 1, while the trial transcript and other documents are numbered starting at R/A-T1.

corridor under surveillance. (R/A 333-5, 392-3, 398, 401) During the first 18 hours of the surveillance petitioner and his three companions had been away from the motel, sightseeing and at entertainment spots. Although the police knew the license plate of their car and the other descriptive information to identify it, no attempt had been made to locate and arrest them. (R/A 336-7, 395-6)

Petitioner and his companions returned to the motel at about 6:00 a.m. on October 19, 1975. (R/A 311). Again, no attempt was made to arrest them, although at least ten officers were present on stakeout.

Police made a conscious decision to wait until they thought the four were asleep before effecting an arrest. (R/A 311-12) Correcting assuming the four to be asleep, the police broke into the rooms at 8:00 a.m. (R/A 345, 498)

The four had traveled to Florida about four days earlier bringing a doberman pinscher with them. They had boarded the dog with a veterinarian several days before the arrest. (R/A 724-5) During the twenty hours of surveillance the police, naturally, had not heard the dog bark nor was the dog with the four when they returned to the motel. The police had no information about the dog's whereabouts since the four had checked into the motel. There was no proof concerning the propensities of the dog, other than its name. One of the arresting officers owned a doberman. Ownership of a doberman in Florida was not illegal in any way. (R/A 343) Immediately on entering the room the police searched for guns. There were no guns in the room. (R/A 345)

The four arrestees were permitted to dress and were taken to the Broward County Sheriff's office, arriving at about 8:30 a.m. (R/A 288-9, 759) All of them, with the exception of Cheryl Kilb, were handcuffed. (R/A 412,474)

After the four had been removed from the motel room, police began a thorough search of the rooms, closets, dressers, and luggage. They thereupon seized every item in both rooms belonging to the arrestees, excluding only the dog cage. (R/A 312-3, 376, 525) A list of the items seized is set forth as Appendix F to this petition at pages 70 to 72, infra.

At about 9:00 a.m. petitioner signed a "rights" form, indicating his willingness to give a statement without an attorney. (Suppression Exhibit 38, R/A 289, 293, T1816)

Petitioner was again questioned at about 10:55 a.m. (R/A 353-5, 447-8) In the interim the evidence seized had been brought into the room in which he was being detained. (R/A 354-5) (The items were used both in questioning petitioner and the two women [R/A 489, 504, 697-8, 760, 765, 818-9, 823].)

During the intervening period, petitioner's request to see his "fiancee" had been denied. (R/A 356, 983-4)

Petitioner started his confession at about 11:00 a.m., finishing it at about 11:45 a.m. (R/A 290-1, 294, 319-23, 353, 446-8) Thereupon, he was permitted to see his "fiancee" and to have lunch with her. And, at about 1:00 p.m., he was brought before a judge in the same building. (R/A 316, 959, suppression exhibit 69-70) (Both women were released later in the day after giving statements [R/A 480-1, 502, 505] The trial court found that both had been arrested; but no charges were lodged against either of them. [See page 48, infra; R/A-T1706])

Petitioner and Lucas had been arrested for the murder, kidnapping and robbery in New York State of one Craig Mitton on October 13, 1975.

The Court found that the police relied on the following facts to establish probable cause:

> Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had

> recently been fired from the same job Mitton had; that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the robbery. Indeed, the police had reason to conclude that Lucas and Graham had fled the area. (Pp. 34-35 , infra.)

On October 17, 1975, the New York State police, acting together with the Newark Police Department, and acting under a search warrant, conducted for "several hours" a thorough search of Lucas's car at the Gateway Downtowner Motel at Newark, New Jersey. (R/A 144) The search was extremely thorough and they seized fingerprints and nearly every loose object in the car, including vacuumings. The list of items seized is set forth as Appendix C , pages 73 to 90 , infra. The seizure was so complete that when they revacuumed the car on October 20, 1975, they obtained no new sweepings. (R/A 117-9)

After the search and seizure on October 17, 1975, the police kept the Lincoln under constant surveillance until they seized it on October 21, 1975, and removed it to the State of New York. (R/A 147-8, 273)

On October 20, 1975, without obtaining a new warrant the police searched the car a second time. New sweepings were done and new fingerprints were taken. These fingerprints established for the first time, on the day after the arrest, a connection between Mittor and the Lincoln. These fingerprints are the only evidence of such a connection. (R/A T835-45)

On the trial, notwithstanding petitioner's confession, a substantial issue developed as to whether or not Lucas and

petitioner in fact killed Mitton. Dr. Milton Gross, then Chief Medical Examiner of the State of Connecticut and now Chief Medical Examiner of the City of New York, testified that Mitton both was shot and died at a time when the People acknowledge that Mitton could not have been killed by petitioner who had already left for New York on their trip to Florida. Dr. Gross testified that the shooting could have occurred no earlier than 1:00 a.m. on October 14, 1975. (R/A - T1203-4) The People's proof indicated that Lucas and Graham arrived at New Windsor, New York between 8:00 p.m. and 9:00 p.m. on October 13, 1975, and left soon thereafter for Newark, New Jersey on their trip to Florida. (R/A T103, T1293-4, T1342)

At his suppression hearing, in addition to Fourth Amendment issues, the petitioner raised the issue of the voluntariness of his confession. In deciding the question of voluntariness, the Trial Court, now affirmed by the Appellate Division, used his belief in the truthfulness of the confession as a factor in determining the voluntariness of the confession. (P/A 822-31)

STAGE AT WHICH ISSUES RAISED

The issue of retroactivity of Payton vs. New York, 445 U.S. , 100 S. Ct. 1371, 63L. Ed. 2d 639, was first raised in the Appellate Division, Third Judicial Department on remand from this Court. (Graham vs. New York, 445 U.S. , 100 S.C. 1371, 63 L. Ed. 2d 639.

Each of the other issues raised herein was first raised on Petitioner's motion in the Sullivan County Court to suppress his confession and the evidence seized in the various searches herein. together with the fruits thereof. Each of the issues, with one exception, was resolved against Petitioner in the decision of the County Court. (Appendix C, p. 37 , infra). The issue of truthfulness as a criterion for voluntariness was resolved against Petitioner by the Sullivan County Court on the record. (Appendix H , p. 91 , infra).

The Appellate Division held against Petitioner on all suppression issues, except that it held assuming that the motel search was conducted in violation of Chimel vs. California, the Petitioner was not prejudiced therety. (Appendix B , p. 37 , infra.)

THE REASONS FOR GRANTING THE WRIT

1. This case squarely presents the question whether the rule of Payton vs. New York, 445 U.S. , 100 S. Ct. 1371, 63 L ED. 2d, should be applied to those cases which were on direct appeal at the time of this Court's opinion.

At the time this Court decided Payton, several cases raising the same issue of the permissibility of warrantless home searches without exigent circumstances were pending in this Court. This Court did not then decide whether to apply Payton to the cases then pending. Rather it remanded the cases to the state courts for reconsideration in light of Payton. (Brown vs. Florida, U.S. , 64 L. Ed. 2d 254, 100 S. Ct. 1826; Bush vs. Florida, U.S. , 64 L. Ed. 2d 255, 100 S. Ct. 1826; Dunagan vs. Illinois, 64 L. Ed. 2d 257 100 S. Ct. 1829; Gayle vs. New York, 64 L. Ed. 2d 257, 100 S. Ct. 1829; Gonzalez vs. New York, 64 L. Ed. 2d 253, 100 S. Ct. 1824; Gordon vs. New York 64 L. Ed. 2d 255, 100 S. Ct. 1827; Vidal vs. New York, 64 L. Ed. 2d 255, 100 S. Ct. 1826.)

On reconsideration, the Appellate Division declined to apply the rule of Payton to Petitioner's case.* Petitioner had raised the unconstitutionality of his warrantless, exigentless arrest in his room at the earliest moment and asserted it throughout a lengthy suppression hearing, trial, and appeal.

Apart from the question of general retroactivity, this case raises the question whether a defendant who has perceived the unconstitutionality of his position and argued at all levels should be denied relief solely by luck of the draw.

The issue of the application of Payton to cases pending at

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*The Appellate Divisionsfor the First and Second Departments have reached the same conclusion: People vs Benitez, 76 A.D.2d, 196, 199, N. 2, 430 N.Y.S.2d 287, 289, N.2: People vs Whitaker, ____A.D.2d ____, 433 N.Y.S.2d 849; People vs Gonzalez, ____ A.D.2d ____, ____N.Y.S.2d ____ (Second Department, 2/23/81); People vs Gordon, ____A.D.2d ____, ____N.Y.S.2d ____ (Second Department, 2/23/81).

the time of its decision in this Court falls within the guidelines established by Rule 17.1 (c) of this Court for the granting of writs of certiorari. In a sense it is "unfinished business" of Payton, itself. The broader question of the general retroactivity of Payton also fits the criterion. These questions are important questions of federal law which have not been, but should be settled by this Court. The number of defendants affected in the States who permitted warrantless, exigentless arrests prior to Payton makes these general questions which should be resolved by this Court.

> 2. This case squarely presents the question of the definition of the constitutional limitations on noticeless entries to effect arrest, and thus raises an important question of Constitutional Law which, to date, has not been, but should be, decided by this Court.

The Appellate Division held below that the noticeless entry of the police into the bedroom of the sleeping petitioner was not illegal because of the existence of exigent circumstances.* (See page 35 , infra.)

The Court relied on the possible existence of the doberman pinscher and of guns in the room as constituting the exigent circumstances. Its reliance in that regard is contrary to an almost unbroken line of cases, discussed below, that the possibility of the arrestee being armed negates the justification for a noticeless, as opposed to a warrantless, arrest.

Furthermore, the facts relied on by the Appellate Division do not warrant a finding of exigent circumstances.

In Ker vs California, 374 U.S. 23, Mr. Justice Clark wrote, for four members of the Court, that "the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search." (Ker vs. California, 374 U.S. 23, 38.)

Notwithstanding the recurrence of the issue, this Court has

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*Exigent circumstances were found only for the noticeless entry; exigent circumstances were not found to justify the warrantless entry.

yet to hold that a constitutional right exists, to define its limits, or to define the exceptions, if any, which would justify a noticeless entry. This situation has arisen either because previously complained of noticeless entires have been struck down as not complying with the relevant local statute or have been upheld as both legal and constitutional. (Ker vs. California, supra; Sabbath vs. United States, 357 U.S. 301; see also, Rodriquez vs. Butler, 536 F2d 982 (2d Cir).)

The existence of a federal, constitutional rights is a recurring problem which has so far been avoided in the lower Courts on the same basis as in this Court: statutory illegality or a finding both of legality and constitutionality. (See, for example, Rodriquez vs. Butler, supra; United States vs. Sokolow, 450 F2d 324 (5th Cir.); United States vs. Chapman; 384 F. Supp. 1232 (S.D. Fla); United States vs. Sims, 231 F. Supp. 251 (D. Md.); People vs. Floyd 26 N.Y. 2d 558, 312 N.Y.S. 2d 193).

The lower Courts have tended to assume the existence of a federally protected right against noticeless entry or to point out that its existence remains in question. (See, for example, Rodriquez vs. Butler, supra, 536 F2d at 985; United States vs. Sims, supra, 231 F. Supp. at 255; People vs. Floyd, supra, 26 N.Y. 2d at 563, 312 N.Y.S. 2d at 1956.)

We respectfully suggest that the right against noticeless entry is too fundamental to be left any longer to conjecture. This Court has noted that:

> The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given gruding application.... Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. (Miller vs. United States, supra, 357 U.S. at 313.)

Such deeply "embedded", "traditional fair procedural requirements", as notice of authority and of purposes should not remain consigned to constitutional limbo. (Miller United States, supra, 357,U.S. at 313).

This case is especially appropriate for addressing the issue because the Appellate Division asserted as exigent circumstances the very circumstances that have traditionally called for a heightened awareness of the need to give notice: the possibility that the arrestees might be armed.

This Court, the Court of Appeals of New York (under whose law the case was decided), and the Supreme Court of Florida (in whose state the entries were made) have all held expressed the view that the traditional requirement of notice is intended to avoid violence particularly where the arestee is armed. Time and again, this Court and others have cited with approval the concurrence of Mr. Justice Jackson:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave trouble if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crimebeset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom windown and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcing officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing the jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves. (McDonald vs. United States, concurring opn. 335 U.S. 451, 460-1; citeu at Sabbath vs. United States, supra, 391 U.S. at 589. Miller vs. United States, supra, 357 U.S. at 313, w. 12; People vs. Floyd, supra, 26 N.Y. 2d at 562, 312 N.Y.S. 2d at 195, note: Koptyra vs. State, 172 (So 2d 628, 631 (Fla).).

The fact relied on by the Appellate Division that the officers armed themselves against the danger ("In fact, one of the arresting officers had wrapped a towel around his arm prior to the entry for protection against the anticipated attack by this animal. [P. 14, infra.]), does not vitiate the essential nature of the traditional rule in this regard. the Appellate Division ignored even the New York formulation of the common-law rule:

> Nor does the circumstances that the arresting officers drew their guns before entering defendant's room prove anything, especially since they were engaging in the extra hazardous act of entering his room by stealth without notice. (People vs. Floyd, supra, 26 N.Y. 2d at 563, 312 N.Y.S. 2d at 195.)

The requirement of notice assumes the possibility of armed defense by the unsuspecting arrestee. It is just this possibility which the requirement seeks to avoid. The requirement of notice gives the armed arrestee the opportunity to surrender peaceably.

New York Criminal Procedure Law §§120.80 and 140.15 are the embodiment of the common law. (People vs. Floyd, supra, 26 N.Y. 2d at 562, 312 N.Y.S. 2d at 194-5). As such the exceptions in C.P.L. §§120.80 (4) and 140.15(4) are not intended to do away with the notice requirement as historically developed, but only to cover situations where the police are under attack or threatened with attack.

In any event, it is appropriate for this Court, should it find a constitutional right of notice to exist, to determine also the limits of that right. This Court should determine if exception to the right, by way of definition of exigent circumstances, may destroy the right itself.

We believe that the argument against such destruction by exception is fully made by the United States District Court for District of Maryland dealing with circumstances strikingly similar to these:

> Lest this Court be thought to have permitted a legalism to prevail over common sense and to have subjected arresting authorities to an unnecessary risk to their lives and safety in the performance of their duty, it is well to restate what is here decided....an arresting officer may not break into a home (here, a hotel room) without prior demand for entry, statement of purpose and refusal of admittance solely on the ground that to demand entry and give notice would result in increased risk of bodily harm to him. This is decided because repeated deliberate decisions over a course of more than three hundred years have concluded that when there is a conflict between these two considerations, the right to privacy in one's own home must prevail over society's interest in punishing the guilty. Here a conflict between these considerations could well have been avoided. Defendant's whereabouts were known to the FBI. No valid reason appears why defendant could not have been arrested going into his hotel room, coming out of his hotel room in a corridor, public room or the elevator of the hotel or outside the hotel. By choosing to make the arrest in the legal equivalent of defendant's home the agents subjected themselves to the necessity of giving notice. Their failure to give notice rendered the arrest illegal. (United States vs. Sims, 231 F. Supp. supra, at 257-8).

Finally this Court, if necessary, should exercise the powers asserted by for it by Mr. Justice Clark "to determine whether, notwithstanding its legality under State law, the manner of entering the house...offend[ed] federal Constitutional standards of reasonableness..." (Ker vs. California, supra 374 U.S. at 38.) May the police reasonably rely on their "fears" of a dog who has not barked for 18 hours? May they reasonably rely on their "fears" that an arrestee is armed in the absence of any objective proof that he is or that he has been at any reasonably recent time, if ever?

We respectfully suggest that definition of the constitutional right of notice before entry is a matter that fully warrants the attention of this Court at this time.

3. (a) The decision below demonstrates the continuing reluctance of New York Courts to abandon the reasonable suspicion standard of People vs. Morales, 22 N.Y. 2d 55, reversed sub. nom. Morales vs. N.Y., 396 U.S. 102, and to adopt the requisite standard of probable cause; (b) the absence of probable cause in this case is so egregious as to warrant intervention of this Court.

The Appellate Division stated the facts upon which it based a finding of probable cause:

> Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had recently been fired from the same job Mitton had; that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the robbery. Indeed, the police had rason to conclude that Lucas and Graham had fled the area. (P. 30-1, infra.)*

It is respectfully submitted that even as to Lucas these facts give rise only to a suspicion. As to petitioner they surely give nothing more.

The Appellate Division reached its conclusion without citation of authority (except as to flights) and without analyzing the facts.

Its decision and the refusal of the New York Court of Appeals to hear the case represent a continuing tendency on the part of the New York Courts to apply the reasonable suspicion standard enunciated in People vs. Morales, 22 N.Y. 2d 55, reversed sub nom, Morales vs. New York, 396 U.S. 102, notwithstanding this Court's decision in Dunaway vs. State of New York, U.S. 99, S. Ct. 2248,

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*The finding that Lucas gave a false address is totally unsupported in the record. He gave his correct address, not only at the motel, but at the car rental agencies and at Western Union. (R/A 284, 394; Suppression Ex's 49, 50, 54.)

60 L Ed 2d 824. (Cf. People vs. Bryant, 71 A.D. 2d 564 , 418 N.Y.S. 2d 621 and People vs. Vese, 100 Misc 2d 8 , 417 N.Y.S. 2d 1015.)

The New York Courts resisted the probable cause standard during the ten years between Morales vs. New York and Dunaway vs State of New York. (See for example, People vs. Morales, 42 N.Y. N.Y. 2d, 129, 135, cert. den. 434 U.S. 1018; People vs. Wise, 46 N.Y. 2d 321; People vs. Liberty, 67 AD2d 776 (3rd Dept.); People vs. Boyer, 65 A.D. 2d 840 (3rd Dept.).)

The decision below represents a continuing application of the Morales reasonableness standard without invoking it by name. Particularly, it continues the use of facts placing the arrestee near the scene of the crime as justification for the police conduct. (See People vs. Morales, supra, 42 N.Y. 2d at 134-5; People vs. Wise, 46 N.Y. 2d 321, 330.)

Petitioner's sole alleged connection with the crime itself is that his friend Lucas was seen at the bank, which Mitton may or may not have arrived at, at least 40 minutes before Mitton would have arrived there. Peculiarly enough, the New York Court of Appeals in Morales recognized that placing "the defendant in the vicinity of the crime" even "at the time of the murder" does not constitute probable cause (People vs. Morales, supra, 42 N.Y. 2d at 135.)

A finding of probable cause in this case so violates the standards ennunciated by this Court to warrant granting this petition, even if the decision below is not part of a pattern of reluctance.

The facts at best warranted this police in seeking to question Petitioner, certainly not in arresting him.

Viewed objectively and without hindsight there is nothing in

the facts which justifies a finding of probable cause. (Beck vs. Ohio, 379 U.S. 89, 91; Rios vs. United States 364 U.S. 253, 261-2)

Lucas's presence near the bank, even when combined with the other meager facts, did not give probable cause to believe he had later waylaid Mitton, transported him 35 miles, robbed him and murdered him. (United States vs. DiRe, 332 U.S. 581; People vs. Morales, supra, 42 N.Y. 2d at 135.)

Nor can petitioner's alleged "flight" be considered as affording probable cause. Viewed objectively, the trip to Florida was equally nothing more than a vacation jaunt by two married men with women other than their wives.

Petitioner's arrest was based solely on suspicion based on conduct that is equally innocent as guilty, and at worst equivocal. Such conduct does not give rise to probable cause. (Henry vs. United States, 361 U.S. 98; Taylor vs. United States, 286 U.S. 1).

The intrusion into petitioner's life was of the highest nature: he was placed under arrest and the arrest was made by warrantless entry into his locked bedroom while he was known to be sleeping. Such an intrusion requires the highest predicate for police intrusion. (Terry vs. Ohio, 392 U.S. 1; see also Stoner vs. California, 376 U.S. 483; McDonald vs. United States, 335 U.S. 451; United States vs. Jeffers, 342 U.S. 48, Johnson vs. United States, 333 U.S. 10.)

4. Even if Petitioner is not entitled to the benefit of Payton vs. New York, his conviction should be reviewed and reversed.

Assuming that Petitioner and other prisoners in his possession as pre-Payton defendants are not entitled to the benefit of the Payton rule, this Court should determine the extent of their rights under pre-Paytor law.

a) People vs. Payton and Riddick called for a heightened identification not found in this case.

In Payton, "two eyewitnesses to the crime -- both of whom had known the defendant -- identified him to the police as the killer. One of the witnesses also furnished the defendant's address." (People vs. Payton and Riddick, supra, 45 N.Y. 2d at 305.)

In Riddick, "the victims had identified defendant from a photograph as the perpetrator of the robberies." (People vs. Payton and Riddick, supra, 45 N.Y. 2d at 307.)

No such direct, eyewitness identification is present here. Petitioner was arrested on weak circumstantial evidence which it constitutes probable cause barely does so. The case gives this Court the opportunity to delineate the nature of the proof of identify necessary to justify a pre-Payton arrest.

b) People vs. Payton and Riddick did not justify all warrantless home arrests. The Court of Appeals itself pointed out "the especially alarming quality of night time entries." (People vs. Payton and Riddick, supra, 45 N.Y. 2d at 311.)

This case gives this Court the opportunity to delineate the circumstances under which a pre-Payton warrantless arrest could be made, particularly in regard to an arrest which "gives the appearance of having been calculated to cause surprise, fright, and confusion" and succeeded in doing so. (Brown vs. Illinois, 422 U.S. 590, 605.)

c) This case gives this Court the opportunity to determine the effect of delay and the general passage of time on both Payton and pre-Payton arrests.

The arrests were made four days after the investigation focused on Graham and Lucas; two days after the police determined Graham and Lucas had gone to Fort Lauderdale; 32

hours after the New York Police arrived in Florida; at least 20 hours after the police located the motel room; and two hours after the four suspects returned to the motel and went to sleep. The time lapse alone belies exigency. The recent words of Chief Justice Berger apply almost verbatim to this case:

> ... It may be useful to note that the factual setting of this case provides what seem to me, a classic illustration of the dividing line between an impermissible, warrantless entry and one permissible under the "exigent circumstance" except to the Fourth Amendment warrant requirement.
>
> ... the IRS agents assigned to the investigation of the fugitive Norman's tax liability place the premises under 24-hour surveillance. One night during the course of this surveillance, the agents observed cartons and other materials being removed from the premises by persons unknown to them. Against the background facts, such surreptitious nighttime activity constituted an exigent circumstance that would have justified an immediate seizure of the materials being moved in order to protect the interest of the United States. This is especially so since here the premises were controlled by the alter ego of an indiviudal who was not a delinquent taxpayer, but who was, at the time, a fugitive from justice. Rather than acting immediately, however, the agents chose to wait for approximately a day and a half or two days before making their entry. I agree with the conclusion that there were no exigent circumstances or these facts; however, the Court holds no more than that the agents' delay after observing these highly suspicious events makes that exception to the warrant requirement unavailable to them. By failing to act at once, the exigency was dissipated .... (G.M. Leasing Corp. vs. United States, U.S. , 97 S. Ct. 619, 663).

Any justification for a warrantless arrest would surely have been lost by the leisurely pace the police set themselves, which gave more than adequate time to obtain a warrant.

d) Should this Court decide not to apply Payton retroactive y, it should not leave pre-Payton defendants in a constitutional limbo. It should decide those constitutional questions which are

left open by Payton. This case is an especially appropriate vehicle for such determinations since the issues are raised so clearly.

> 5. The Appellate Division concedes that the motel search violated the rule of Chimel vs. California, 395 U.S. 752, but justifies the search and receipt of the items seized into evidence on the basis of the confession which followed and is a product of the search. Such a ruling violates fundamental rulings of this Court and warrants the corrective review of this Court.

The Appellate Division assumes that the motel search was improper but holds that "in light of the overwhelming case against him once his confession had been admitted, and the faint prejudicial impact of the fruits of the improper search, the error must be considered harmless (see People v. Crimmins, 36 N.Y. 2d 230, 240-241...)" (P. 35 , infra)

(Interestingly enough, this is an incorrect statement of the New York rule. By citing to Crimmins at 36 N.Y. 2d at 240-241, the Appellate Division applied the Crimmins rules for non-constitutional error rule which requires reversal unless "there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt". (People vs. Crimmins, supra, 36 N.Y. 2d at 237.).)

There was a serious trial issue, especially in light of Dr. Gross's testimony that the shooting took place after 1:00 a.m. on October 14, 1975, when petitioner was already in New Jersey. Surely, the safe deposit keys and other evidence seized in the motel search contributed to the jury's rejection of Dr. Gross's testimony. Other evidence such as the safe deposit box and the money, were obtained from leads given by the illegally seized evidence, (Nardone vs. United States, 308 U.S. 338.) The receipt of this evidence was not harmless beyond a

reasonable doubt and Appellate Division did not even find it to be so. (Chapman vs. California, 386 U.S. 18, 21-4; Fahy vs. Connecticut, 375 U.S. 85, 91-2)

The Appellate Division justified the search on the basis of the confession which was, at least in part, the product of the search. The Court may not so support an unconstitutional search. The justifying confession is itself the poisonous fruit of the tree. (Wong Sun vs. United States, 371 U.S. 471)

Such misconceptions justify review by this Court not only to correct the situation in this case but to remind the Courts that their view of a defendant's guilt cannot be determinative of the constitutional issues before them.

> 6. This Court should review the decision below because the Appellate Division refused to suppress the fruits of a general search in violation of principles long and clearly enunciated by this Court.

The police seized everything in the two rooms except the dog cage. They searched drawers, suitcases, closets, and medicine cabinets.

Whether viewed as a proper warrantless search or as a search incident to an arrest, the search was unconstitutional.

General searches, with or without a warrant, are unconstitutional:

> General searches have long been deemed to violate fundamental rights. It is plaint that the Amendment forbids them. (Marron vs. United States, 275 US 192, 195; see also Stanford vs. Texas 379 US 476)

Since a warrantless search is an exception to the Fourth Amendment warrant requirement, no greater rights are acquired by the policy in a warrantless search. Warrantless, general searches are equally abhorrent as general warrants conducted under warrants:

> General or exploratory searches are condemned even when they are incident to a lawful arrest. (Amador-Gonzalez vs. United States, 391 F2d 308, 313. See also United States vs. Bravo, 403 F. Supp. 297, 302-3)

Indeed, limitation of searches is one of the two main reasons for requiring a warrant in the first place. (Coolidge vs. New Hampshire, 403 US 443, 467.)

The seizures in this case fall clearly within those prohibited by this Court in Kremen vs. United States, 353 U.S. 346.

Both the police and the Courts appear to require reminder by this Court that the right to search and seize is a delimited one.

> 7. The decision below gives this Court an opportunity to reaffirm a principle so basic that it is rarely stated and oft forgotten: that truthfulness is not an element of voluntariness.

The County Court considered the truthfulness of the confession as a factor in his determination of voluntariness:

> THE COURT: It appears to me the truth and accuracy of a statement would have a bearing upon its voluntariness. (R/A 732)
>
> THE COURT: I think the truthfulness and accuracy of his confession has a bearing upon its voluntariness. It certainly has to me. (R/A 733)
>
> THE COURT: It's a matter of common experience and knowledge, Mr. Zager. If a man's words are twisted, and the details being given of some event, and if it's being done under some compulsion, that the might give details which are altogether different from the truth. If he is, on the other hand, making a voluntary statement of his own free will and without any violation of any of his constitutional rights, and in the desire to cooperate, there is a likelihood his statement would be more truthful. I think that the accuracy or truthfulness of a statement that is given has a bearing upon the issue as to whether or not it was voluntarily given. That is the only reason I'm taking it. (R/A 739)
>
> THE COURT: I will overrule the objection on two grounds. ...secondly, it relates to the truthfulness of the confession. I believe it would have some bearing upon the issue which I have to decide, which is its voluntariness. (R/A 823)

> THE COURT: The Court is saying, and I'm saying and I think I have said it very clearly, that the truthfulness of the confession would have a bearing. It's not determination, not dispositive of the issue, but would have a relationship or bearing upon the question that the Court has to determine. (R/A 826)

These rulings, as affirmed, violate fundamental principles of the privilege against self-incrimination. They put defendant to the test, of proving his confession to be false, when that is not properly a factor.

This Court has clearly rejected the criterion of truthfulness, yet the trial Court repeatedly asserted truthfulness as a factor in his determination.

Fundamentally, the privilege against self-incrimination assumes the truthfulness of the confession, but asserts the society's higher value in freedome from coercion:

> Our decisions under that Amendment [14th] have made clear that convictions following the admission into evidence of confessions which are involuntary...cannot stand. This is so not because such confessions are likely to be untrue but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law... (Rogers vs. Richmond, 365 U.S. 534, 540-1.)

> From a fair reading of these expressions, we cannot but conclude that the question whether Roger's confessions were admissable into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the Trial Judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined -- a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. (Rogers vs. Richmond, supra, 365 U.S. at 543-4) (emphasis supplied)

The use of the incorrect truthfulness standard should have resulted in reversal of the finding that the confession was voluntary:

> We are barred from speculating--it would be an irrational process -- about the weight attributed to the impermissible consideration of truth and falsity which, entering into the Connecticut trial court's deliberations concerning the admissability of the confessions, may will have distorted by putting in improper perspective, even its findings of historical fact. Any consideration of this "reliability" element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known, (Rogers vs. Richmond, supra, 545) (Emphasis supplied)

In light of the fundamental misconception of the privilege by the Courts below, it is proper that the Court reaffirm the irrelevance of truthfulness to a determination of voluntariness.

> 8. This Court should review this case because the Courts below have failed to follow the mandates of this Court concerning multiple searches.

The Courts below did not resolve the question of whether the second search of the Lincoln on October 20, 1975, was warrantless or not. In either event the search was conducted in violation of the mandates of this Court.

The October 20, 1975, search cannot be justified under the warrant of October 17, 1975, which had been fully and thoroughly executed.

A search warrant authorizes only one search; it does not allow the police two bites of the apple. The Fourth Amendman prohibits "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." (Berger vs. New York, 388 U.S. 41, 59.)

Beyond that statement, the rule appears to have been developed in the lower courts. (Mellet & Nichols Brewing Co. vs. United States, 296 Fed. 765, 768-9; United States vs. American Brewing Co., 296 Fed. 772, 777-8; Coburn vs. State, 78 Okl. Cr. 362, 148, P. 2d 483, 494; Duncan vs. State, 11 Okl. Cr. 217, 144 P. 629, 632; State vs. Moran, 103 W. Va. 753, 138 S.E. 366, 368; State vs. Pina, 383 p. 2d 167, 168-9; McDaniel vs. State, 197 Ind. 179, 150 N.E. 50;

State vs. Parsons, 83 N.J. Super. 430, 200 A2d 340, 350.)

Viewed as warrantless, the search of October 20, 1975, was equally unconstitutional. (Mincey vs. Arizona, U.S. , 98 S. Ct. 2408; Coolidge vs. New Hampshire, 403 U.S. 443, 458-64; of Caldwell vs. Lewis, 417 U.S. 583).

This case especially gives the Court the opportunity to distinguish between surveillance and seizure of a motor vehicle.

The police had the car under surveillance from October 17 to October 21. They searched the car on October 17 and on October 20, seizing and carrying away most of the evidence.

On October 21, without a new warrant, they seized the car itself. We believe that it is proper for this Court to determine if such a seizure, independent of the searches, is proper.

9. We urge that this Court should review this case because the lower Courts were so enthralled by defendant's confession that the entire proceedings were distorted so that constitutional issues were decided in general in violation of existing principles denying petitioner a fair hearing.

It is respectfully suggested that the constitutional issues herein were resolved not on their merit but on the strength of the Court's overwhelming belief in petitioner's guilt, thus denying petitioner a fair hearing on the issues.

This Court, both to protect the rights of petitioner and to remind Courts of the independence of guilt and denial of constitutional rights, should review this case. Petitioner should be entitled to have constitutional issues decided dispassionately on constitutional principles.

10. This Court should grant the writ notwithstanding the application was filed more than 60 days after denial of leave to appeal to the Court of Appeals of the State of New York.

This petition is filed more than 60 days after leave to appeal to the Court of Appeals of the State of New York was denied. Therefore, it was not timely under this Court's rules.

As appears from the annexed affidavit of Stephen L. Oppenheim, Exhibit I, p. 92, infra, the delay was solely the result of error by assigned counsel.

Since the defect is not jurisdictional, since the petition raises substantial issues, and since the delay is solely the result of error by assigned counsel, it is respectfully prayed that this Court grant the writ notwithstanding the tardiness of this application.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: March 23, 1981

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(914) 794-5641

July 31, 1980.

32356

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

RICHARD B. GRAHAM, Appellant.

Judgment modified, on the law and the facts, by reversing the conviction of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

Opinion per MAHONEY, P. J.

SWEENEY, KANE, STALEY, JR., and HERLIHY, JJ., concur.

#32356

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- against -

RICHARD B. GRAHAM,
Appellant.

Argued, June 19, 1980.

Before,

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. ELLIS J. STALEY, JR.,
HON. J. CLARENCE HERLIHY,
Associate Justices.

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APPEAL from a judgment of the County Court of Sullivan County (Louis B. Scheinman, J.), rendered November 3, 1977, upon a verdict convicting defendant of murder in the second degree (two counts), kidnapping in the first degree and robbery in the first degree.

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STEPHEN L. OPPENHEIM, for appellant, 253 Broadway, Monticello, New York 12701.

JOSEPH JAFFE, District Attorney (Stephen Lungen of counsel), for respondent, 6 North Main Street, Liberty, New York 12754.

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OPINION FOR MODIFICATION

MAHONEY, P. J.

When this matter was before this court originally (69 A D 2d 544), we modified the judgment by reversing the conviction of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as modified, affirmed, holding that there was no error in the warrantless arrest since there was probable cause.[1]

Thereafter, leave to the Court of Appeals was denied (48 N Y 2d 980) as was a motion to reconsider that determination (49 N Y 2d 804). On May 12, 1980, the United States Supreme Court, pursuant to defendant's application, entered the following order:

> The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Third Judicial Department, for further consideration in light of Payton v. New York, 445 U. S. ___ (1980).

In Payton v. New York (445 U.S. ___, 100 S. Ct. 1371, supra), the Supreme Court concluded that absent exigent circumstances, the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's

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1 A complete recitation of the facts can be found in the reported decisions (People v. Graham, 90 Misc 2d 1019; 69 A D 2d 544).

home in order to make a routine felony arrest.[2] It follows, therefore, since Payton was decided after defendant was convicted, that the new rule of criminal procedure propounded therein is applicable to Graham's murder convictions only if such rule is applied retroactively. We conclude that it should not be given such retroactive application.

We recently noted in People v. Albro (73 A D 2d 73, 75) that "[t]he easy to apply common-law rule that cases on direct appeal received the benefit or detriment of changes in decisional law and that final judgments were not affected by subsequent changes is no longer valid", it being our view that the instruction of Johnson v. New Jersey (384 U.S. 719, 728) to the effect that each constitutional rule of procedure must be individually analyzed to determine if it will be given retroactive application must be followed. In furtherance of such analysis, certain guidelines, adopted by the Court of Appeals (People v. Morales, 37 N Y 2d 262, 269) have been established to determine if a rule of constitutional dimension should be retroactively applied. They are (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards (Desist v. United States, 394 U.S. 244, 249. See also People v. Albro, 73 A D 2d 73, supra).

Again, as we stated in Albro, the most important of these factors is the purpose to be served by the new constitutional rule (supra, p. 75), and that purpose can only be discerned by a close examination of the rule to determine if the application of the same goes to the "very integrity of the fact-finding process" (People v. Buia, 34 N Y 2d 529, 530; accord Stovall v. Denno, 388 U.S. 293, 298). Thus, the Court of Appeals has concluded that there is no sufficiently compelling reason for New York State to establish a time of application for newly promulgated constitutional rules different from that recognized by the Supreme Court (see People v. Buia, supra, in which retroactivity of the rule of Chimel v. California, 395 U.S. 752 [narrowing the permissible scope of searches incident to arrest] was denied on the authority of Williams v. United States, 401 U.S. 646).

We turn now to a determination of whether the newly promulgated constitutional rule affects the "very integrity of the fact-finding process." In view of how that guideline was applied by our nation's

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2 We determined that "[a] motel room is entitled to the same protection under the Fourth Amendment as the home" (69 A D 2d 544, 547, citing People v. Wood, 31 N Y 2d 975).

highest court in Linkletter v. Walker (381 U.S. 618) wherein the exclusionary rule of Mapp v. Ohio (367 U.S. 643) was denied retroactive effect, as well as in Williams v. United States (supra) and in Hill v. California (401 U.S. 797) where the rule of Chimel v. California (supra) was held not to be retroactive, we are compelled to conclude that the subject rule, i.e., that, absent exigent circumstances, a warrantless entry for the purpose of a routine felony arrest is unconstitutional, is not so essential to the "very integrity of the fact-finding process" that all past reliances upon existing statutory law should be negated so as to rehabilitate with innocence those who by their intentional acts seriously offended our penal statutes. Accordingly, we decline to apply Payton retroactively and adhere to our original decision.

The judgment should be modified, on the law and the facts, by reversing the conviction of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

RICHARD B. GRAHAM,

Appellant.

Argued, June 4, 1979.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. J. CLARENCE HERLIHY,
Associate Justices.

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APPEAL from a judgment of the County Court of Sullivan County (Louis B. Scheinman, J.), rendered November 3, 1977, upon a verdict convicting defendant of two counts of murder in the second degree, one intentional and the other felony murder, kidnapping in the first degree, and robbery in the first degree.

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STEPHEN L. OPPENHEIM, for appellant, 253 Broadway, Monticello, New York 12701.

STEPHEN LUNGEN, as Special Prosecutor, 6 N. Main Street, Liberty, New York 12754.

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OPINION FOR MODIFICATION

APPENDIX B

MAHONEY, P.J.

A complete recitation of the facts can be found in the reported decision on the defendant's pre-trial suppression motion (People v. Graham, 90 Misc 2d 1019). Briefly, Craig R. Mitton, who collected daily revenues from service stations for his employer, Mid-Valley Petroleum Corporation of Newburgh, New York, disappeared after leaving company offices late in the afternoon of October 13, 1975 to make a deposit. His body, bearing three bullet wounds and marks of a blow to the head, was discovered in Sullivan County two days later. Over $25,000 in collections were missing. By the evening of October 18, the police had learned that the defendant, Lucas and two women were registered in rooms 307 and 308 of the Airport Travel Motor Lodge in Dania, Florida. The rooms were empty when the police arrived and surveillance was continued throughout that night. At approximately 6:00 A.M. the next morning, the defendant and his party returned to their rooms. Due to a misunderstanding in communications with State Police headquarters in Middletown, New York, the State Police officers assisting the Broward County Sheriff's office in the investigation and arrest believed that a warrant had been issued for defendant's arrest at 7:00 P.M., October 18, in New York. Therefore, at 8:00 A.M., on October 19, the police entered the motel rooms and arrested the defendant. Only later did the police learn that the warrant had in fact not yet been issued.

After his arrest, defendant gave a full confession to the police. This confession was so detailed and consistent with the facts which the police had independently uncovered as to constitute overwhelming proof of guilt. The defendant's briefs, if a production which numbered over 300 pages can still be called brief (see Slater v. Gallman, 38 N.Y 2d 1, 5), when reduced to their significant arguments, essentially challenge the admissibility of the confession in light of an allegedly defective arrest procedure under

the Federal Constitution and Florida law. Of course, if the arrest was defective the subsequent confession could not be admitted because the connection between the arrest and the inculpatory statement had not yet become so attenuated as to dissipate the taint (Brown v. Illinois, 422 U.S. 590; People v. Stewart, 41 N Y 2d 65). But we find no error in the arrest procedure.

A warrantless arrest is authorized under New York law (CPL 140.05, 140.10) and Florida law (Fla. Stat., § 901.15). Such an arrest may be made where the arresting officer has probable cause to believe that the person to be arrested has committed a felony. As yet, the United States Supreme Court has not prohibited warrantless arrests following entry into a suspect's home even in the absence of exigent circumstances (United States v. Watson, 423 U.S. 411, 418, n. 6). Therefore, the legality of the arrest in this case turns on state law.

A motel room is entitled to the same protection under the Fourth Amendment as the home (People v. Wood, 31 N Y 2d 975). Nonetheless, in New York a warrantless entry to make a felony arrest, if based upon probable cause, is permissible (People v. Payton, 45 N Y 2d 300, oral arg. before U.S. Sup. Ct. March 26, 1979 [47 U.S. Law Wk. 3651]). The same result obtains under Florida law (State v. Perez, 277 So 2d 778 [Fla.], cert. den. 414 U.S. 1064; West v. State, 355 So 2d 489 [Fla. App.]). Thus, despite defendant's contention otherwise, this case presents no choice of law issue. Once probable cause is established, the arrest procedure employed against defendant is valid.

On the facts before us, we find sufficient probable cause to justify the arrest. Before they arrested the defendant, the police officers knew: that Mitton had been the victim of a robbery and murder; that Lucas and another person had been seen near the bank close to the time Mitton was to arrive; that the defendant had recently been fired from the same job Mitton had; that Lucas and the defendant had made plans to leave the area; that although neither Lucas nor the defendant was registered at the Downtowner Motel, Lucas left his car there, rather than at the airport; that the defendant and Lucas were registered in the Florida motel under false addresses; and that Lucas had told a person in the Walden, New York area not to disclose their whereabouts. Thus, the police had done more than merely place Lucas near the bank at about the time of the robbery. Indeed, the police had reason to conclude that Lucas and

the defendant had fled the area. Flight is an important element in establishing probable cause (see Peters v. New York, 392 U.S. 40, 66; People v. Kreichman, 37 N Y 2d 693, 699).

Defendant also challenges the arrest because the police did not give notice of their authority prior to entry. Both New York and Florida, however, permit noticeless entry for the purpose of making an arrest when the safety of the arresting officers might otherwise be endangered (see CPL 120.80, subd. 4; 140.15, subd. 4; Fla. Stat., §§ 901.17, 901.19, subd. [1]). See also Benfield v. State, 150 So. 2d 636 (Fla. App.)). At the time of the arrest, the police knew that the defendant and his companions had taken a Doberman Pinscher with them to Florida. In fact, one of the arresting officers had wrapped a towel around his arm prior to the entry for protection against the anticipated attack by this animal. Furthermore, it was reasonable for the police to believe that defendant, a fugitive from a homicide in which the murder gun was still missing, might be armed. Therefore, defendant's objection to the noticeless entry is without merit.

Assuming the warrantless search of defendant's motel room conducted after his arrest was improper (see Chimel v. California, 395 U.S. 752; People v. Evans, 43 N Y 2d 160, 165), in light of the overwhelming case against him once his confession had been admitted, and the faint prejudicial impact of the fruits of the improper search, the error must be considered harmless (see People v. Crimmins, 36 N Y 2d 230, 240-241; cf. People v. Grant, 45 N Y 2d 366, 378-379). Defendant also maintains that items seized from Lucas' vehicle should have been suppressed because the warrant was defective. Even if defendant had standing to make such a challenge (see Rakas v. Illinois, ___U.S. ___, 99 S. Ct. 421), the warrant issued for the search of Lucas' Lincoln Continental in New Jersey was not fatally vague. It authorized a search for "other evidence of a homicide" and because it so limited the scope of the search to one particular crime it cannot be considered an unconstitutional general warrant (see Andresen v. Maryland, 427 U.S. 463. See also Lo-Ji Sales, Inc. v. State of New York, ___ U.S. ___ [June 11, 1979]). Therefore, this evidence was properly admitted.

Defendant's remaining complaints of illegal police activity are not persuasive. However, two issues affecting sentencing remain. Defendant asserts that since he was convicted of felony murder, the kidnapping and robbery charges should have been dismissed as lesser included offenses. Since participation in one of the enumerated predicate felonies (see Penal Law, § 125.25, subd. 3) is a requisite

of the crime of felony murder, if the defendant is convicted of felony murder, the predicate felony charge must be dismissed (People v. DeGata, 54 A D 2d 929, lv. to app. den. 45 N Y 2d 841; People v. Barnes, 60 A D 2d 654; cf. People v. Shumen, 37 N Y 2d 302, 305. But see People v. Nichols, 230 N. Y. 221, 225-226, cf. People v. Perez, 45 N Y 2d 204). In addition, the kidnapping charge merged with the robbery since the abduction did not exceed 12 hours before the victim Mitton died, and because it was incidental to and inseparable from the crime of robbery (see People v. Smith, 47 N Y 2d 63; People v. Cassidy, 40 N Y 2d 763). Mitton was only abducted in order to get the money he was carrying. Therefore, since the kidnapping charge merged into robbery, only one predicate felony survived and it must be considered included in the felony murder conviction. The judgments imposed for conviction of kidnapping in the first degree and robbery in the first degree must necessarily be vacated.

The judgment should be modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

STATE OF NEW YORK

COUNTY COURT : COUNTY OF SULLIVAN

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THE PEOPLE OF THE STATE OF NEW YORK

-against- OPINION

RICHARD B. GRAHAM
RICHARD P. LUCAS,

Defendants.

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APPEARANCES:

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SULLIVAN, J.

APPENDIX C

These are motions by defendants to suppress certain tangible evidence seized pursuant to search warrants and also a warrantless arrest, and to suppress certain confessions or admissions.

The indictment charges defendants with the crimes of murder in the second degree, kidnapping and robbery.

Although the cases have been severed for trial, these hearings were combined and held jointly, pursuant to stipulation.

This opinion will set forth the facts found by this Court in making its determination (C.P.L. 710.60 subd. 4). Although different standards of proof are required on the several types of suppression sought (Peo. v. Dohlinger, 32 N.Y. 2d 356, clear and convincing evidence test on motion to suppress evidence other than a confession, and Peo. v. Huntley, 15 N.Y. 2d 72, beyond a reasonable doubt test as to voluntariness of a confession), this Court has found all facts mentioned beyond a reasonable doubt.

At about midnight of October 13, 1975, one Craig R. Mitton was reported missing by his wife. It was learned by the New York State Police that he had been employed by the Mid-Valley Petroleum Corporation of Newburgh, New York, as a route sales supervisor, whose duties included collecting money from gas stations operated by his employer and depositing same each afternoon at about 4:00 P.M. in a night depository at a certain local branch bank.

The police learned from company officials that on said date of October 13 he had made up the deposit, which included cash in four bags, and left for the nearby bank at a time which was between 4:00 o'clock, and 4:45 o'clock

P.M. on that date. He was not seen or heard from thereafter, and the said deposit in excess of $25,600 had not been made.

On October 15, 1975, his body was found in Sullivan County, with clear evidence that he had been the victim of foul play, his body evidencing 3 bullet holes, 2 in the head and 1 in the back, and a blow to his head.

The vehicle used by the deceased, which belonged to his employer, was found abandoned in another location, with a change box.

The police learned from one Gloria Baker, who personally knew defendant Lucas, that at about 4 o'clock P.M. on October 13, she had seen defendant Lucas sitting in a Lincoln automobile with another unidentified person at the branch bank where the deceased was to have made the deposit. Gloria Baker also advised the police that defendant Lucas had cohabited for a time with one Madeline Mead, employed at the Middlehope Service Station, and that defendant Graham had also been employed at said service station. The police also learned from a Julia Tibby, that her sister, Sherryl Kilb had gone on a small vacation with defendant Lucas, another girl, Birdie, and another fellow, "Richie".

The police also learned from company officials that defendant Graham had held the same position with Mid-Valley Petroleum Corporation as the deceased, but had been fired about 2 weeks earlier for taking home a deposit of approximately $30,000 without depositing same in the night depository at the same bank branch.

Julia Tibby had also told the police that Graham

possessed a handgun. Further inquiry disclosed that he had no permit for same.

The police were also advised that defendant Graham were a gun holster on his person.

The police also learned that the defendants were friends, and that they and the girls Sherryl Kilb and Roberta Graham had left the area in the evening or night of October 13.

One Georgia Shorey had also advised the police that Lucas, Sherryl Kilb, Graham and one Roberta Holmes were together in the New York City area, and that Georgia Shorey had a money-gram waiting for her at the Newburgh Western Union office, subsequently learned to be in the sum of $100, from one of the defendants in Florida.

Gloria Baker had also advised the police that about a week earlier, Lucas had called her to obtain the keys to the safe at the Middlehope Service Station, as he was in need of money and that no one would be hurt. She refused, and subsequently she received a telephone call from Lucas telling her that if she told anyone of their conversation he would shoot her. On that same evening the said gas station was burglarized and money and cigarettes stolen.

Subsequently, the police learned that Georgia Shorey received a telephone call from Lucas advising her not to reveal the whereabouts of the two defendants and the girls to anyone.

The police launched a search for defendants and checked airports in the New York metropolitan area and located the

1974 Lincoln at the Gateway Motel in Newark, New Jersey, near Newark Airport, during the early morning hours of October 17.

The Motor Vehicle Bureau confirmed that the car belonged to Lucas. A bartender at the motel identified a photograph of Lucas, and advised the police that he had been tipped with a paper bag containing about $8.00 in change, there having been change missing from the change box found in the company car driven by the deceased victim.

The police also learned that defendant Lucas had an extensive arrest record with one or two convictions. The crimes mentioned on his record included crimes of violence and the use of firearms.

A check made with the Motor Vehicle Bureau revealed that the Lincoln automobile owned by Lucas was a 1974 model, and its license plates number, which matched the plates on the car.

Following the location of the automobile, the same was placed under discreet surveillance by the New York State Police, and that afternoon other New York officers arrived. Subsequently, at about 4:00 P.M. on the 17th, Investigators Chandler and Ovens, together with a member of the local prosecutor's office, appeared before a Superior Court judge of the State of New Jersey and gave testimony under oath before said judge in their application for a search warrant of the automobile. A transcript of said proceedings was received in evidence, showing that there was preliminarily a discussion with the Court, after which the Court placed the oral application on the record, the Court capsulizing or summarizing

the facts giving rise to probable cause on the record.

An issue was raised at the hearing as to whether the officers were sworn during the recorded phase of the record, which contains most of the facts abovementioned, or, as Investigator Chandler testified, when the initial discussion with the Court commenced off the record. Defense counsel were given the opportunity to confer with the New Jersey Court, and to call the judge as a witness to controvert the testimony of Investigator Chandler. Although one of the defendant's attorneys conferred with said judge, he was not called.

This Court finds beyond a reasonable doubt that all of the foregoing facts were laid before the New Jersey Court, under oath, which, in the transcript in evidence held "I am satisfied that there is probable cause to believe that a crime has been committed and that there is probable cause to believe that the automobile sought to be searched and seized has been sufficiently established as the connecting link between the commission of the homicide and evidence of the crime," and signed the search warrant (People's Exhibit 24A, p.11).

A search of the car was then conducted by a New Jersey police officer with 2 New York State Police officers in attendance and assisting.

It should be noted, parenthetically, that the reason the application for the search warrant was made by sworn testimony rather than by affidavit is recited in the New Jersey transcript in evidence, i.e., that the application was made on a Friday, at about 4:00 o'clock P.M., and that there was, therefore, insufficient

tice to prepare papers for the Newark prosecutor's office and the probable unavailability of a judge on the weekend.

The search of the Lucas' vehicle yielded miscellaneous papers belonging to defendants Graham and Lucas and a Debra Kilb, a rope, a rifle, shotgun shells, a hair from the trunk area, and other items of property.

All items of personal property found in the car, and the car itself, were inventoried and, with the approval of the New Jersey Court, removed to New York State Police headquarters in New York.

A check with the airlines in Newark revealed that a "Mr. and Mrs. Richard Lucas" and a "Mr. and Mrs. Richard Graham" had departed on a 9:05 P.M. flight from Newark to Fort Lauderdale, Florida, on October 14. The police also learned that defendants had a Doberman Pincer dog with them.

A number of New York State Police officers flew to Fort Lauderdale on the night of October 17. The following day, October 18, the police learned from the Western Union office in Florida from which money-grams had been sent to the Newburgh, N.Y. area the address of a motel in Dania, Florida, which defendants had given to Western Union. It was further learned that Lucas and Graham had sent an additional money-gram each to the Newburgh, N.Y. area.

It was also learned that defendants had registered at this motel under their own names in 2 rooms, but had given false addresses, and had also rented a car and motorcycle, that they had

a large amount of money with them in travelers checks.

On the 18th, the New York State Police officers met with officers of the Broward County Sheriff's department and a member of the Florida Division of Law Enforcement, filled them in on all of the foregoing facts, including those earlier mentioned herein in dealing with probable cause for the automobile search warrant obtained in New Jersey, and a surveillance was maintained of the 2 motel rooms occupied by defendants.

The Florida police requested a teletype message from New York, describing defendants as fugitives. The New York police made such request by telephone, and also for an arrest warrant to be obtained in New York. The teletype message directing the arrest was received in Florida before 8:00 P.M. on the 18th. However, it appears that although the officer in charge of the investigation in New York requested that an arrest warrant be obtained here, the same was not obtained until October 20. However, the officers believed that the warrant had been obtained and was in existence prior to the arrests.

Defendants and the 2 women with them returned to the motel rooms at 6:00 A.M. on the 19th. Believing them to be armed and with a vicious dog, the police waited until 8:00 A.M. when without warning or notice, the police officers simultaneously, with the use of a passkey to one room, and through an unlocked door to an adjoining room, entered both rooms with drawn guns and one officer with a towel wrapped around his arm as a precaution against the dog, and arrested the defendants, who, together with the 2 women, were taken to the Sheriff's Department in Fort Lauderdale, where they

arrived at 9:00 A.M. There was no dog in the room, it having been placed with a veterinarian a day or 2 earlier, nor any guns found.

Defendant Graham was given his full "Miranda" warnings 4 times, once in the motel room, upon arrival at the Sheriff's Department, before making his confession, and at the beginning of his confession, which was tape recorded. On 2 occasions, at 9:00 o'clock and 11:00 A.M., he signed written acknowledgments of having received these warnings and, specifically waived counsel, as he also did orally at the commencement of his tape recorded confession.

A typewritten transcript of Graham's confession was received in evidence at the hearing, (which Graham subsequently refused to sign) and this Court listened, in camera, to the tape recording of the confession (by stipulation). This Court is satisfied beyond a reasonable doubt that Graham knowingly, intelligently and voluntarily waived his right to remain silent and to counsel.

The confession, which took 45 minutes to tape, was completed orally at 11:45 (the same day as the arrest) and in brief substance sets forth the following:

Lucas, who was his friend and drinking companion, and familiar with handling of the moneys at Mid-Valley Petroleum, suggested the robbery of Craig Mitton to Graham who agreed to participate. On October 13, they waited for the victim at the branch bank, held him up, Lucas ordering Mitton into Lucas' car, Graham following in Mitton's station wagon. They drove to a lonely country area where they abandoned Mitton's car, ordering Mitton into the

trunk of the Lincoln. They then drove to another isolated area, Lucas and Graham discussing the fact that Mitton knew Graham as co-employees of Mid-Valley, Lucas insisting, therefore, that they had to "blow him away". When the car was stopped, Graham opened the trunk, Mitton was ordered out, Graham hit him over the head knocking him down with a club, and while Mitton was on the ground, Lucas shot him in the head and back area several times until his gun jammed, and then left the body of the victim there, left the murder scene, picked up the 2 women, disposed of the handgun used in the killing in a stream in New Jersey, etc. He told of taking the money, about $26,000, including change from the change box, he and Lucas placing most of the money in safety deposit boxes in 2 banks in Newark, purchasing travelers checks, and leaving for Florida. He exonerated the 2 women from any implication in or knowledge of said crimes.

Lucas refused to make any statements to the police.

On Oct. 21, both men were taken before a Court in Florida, and waived extradition to New York, Lucas after conferring with counsel which he had requested.

It should be mentioned here that Graham testified in his own behalf at the hearing, and claimed that he had been beaten by an officer Reidy of the New York State Police about 10:00 A.M. while in the Sheriff's office in Florida and his confession thus coerced. This Court is convinced that said claim is a pure fabrication, as Investigator Reidy had little or no contact with him subsequent to the arrest and prior to the confession, Reidy having remained at the motel after the arrests and removal of defendants assisting Florida Police in inventorying the property found there.

Also, Graham claimed marks on his torso from the alleged beating, having evidently forgotten when he testified that when processed at the N.Y. State Police barracks upon his return he had been photographed, front and rear, with absolutely no evidence of same, nor had he complained of any mistreatment to any other police officer nor to the Florida Court when he was brought before said court.

The hearings also covered an inculpatory statement made by Lucas on the airplane trip back to New York. It is clear, even from the testimony of Lucas at the hearing, that he was not mistreated in any way, and that his remarks to the police officer seated next to him on the airplane were voluntary, unsolicited, and after being warned before he spoke that his statement could be used against him. Nor was such statement the result of any interrogation. Lucas merely denied making the statement, and whether he did or did not would be for a trial jury to decide.

An issue developed regarding a cowboy type hat worn by Lucas. This hat had been returned to Lucas in Florida, and he wore it on the trip back to New York. However, after processing at the state police barracks, he inadvertently left it there. The police, then realizing it had evidentiary value, kept it as evidence. Lucas also seeks its suppression.

Based upon the Graham confession and its mention of the hiding of the money proceeds in safety deposit boxes in Newark, the police obtained the names of the banks and the numbers of the accounts, and applied by written sworn applications to the same New Jersey court for search warrants on these 2 banks and respective safety deposit boxes, obtained the search warrants, and searched and

seized the boxes and bank records pursuant thereto.

Returns on all search warrants were duly furnished to the New Jersey Court, and upon order of said Court, all seized property was returned to New York State (including the car and its contents).

Lucas's safety deposit box yielded $10,342.00. Graham's safety deposit box yielded $10,893.00.

It should be noted here that defendants called Roberta Holmes and Sherryl Kilb as their witnesses. The women testified that they were taken also to the Sheriff's Department in Florida, were given Miranda warnings and both made statements to the police. They were well treated, taken back to the motel, the police making the arrangements for their return to New York and transportation to their respective homes. Graham had given Roberta Holmes the keys to the safety deposit box which she kept in her purse, and she had no objection to the police taking the keys. These keys were of the safety deposit box rented by Graham. Lucas' keys to the safety deposit box rented by him were amongst the property removed from his room.

An issue also developed at the hearing as to whether the 2 women were arrested in the motel rooms. This Court finds from the evidence that they were, in that their movements were restrained, they were taken to the Sheriff's office and not advised they were free to leave until after they were interrogated and after Graham's confession when the police were satisfied that they had no knowledge of the crimes.

This Court further finds that due to the foregoing, and the police initially not expecting the women to be returned to

the motel, that all the contents of the rooms occupied by the defendants were inventoried and removed to the Florida sheriff's office for safekeeping, and, after certain belongings were returned to the women upon their release that day, all the rest of the property was turned over to the New York State Police for return to New York.

On October 20, while the 1974 Lincoln was still in New Jersey, the trunk interior was dusted for fingerprints, and fingerprints of the deceased, Craig Mitton, found.

Defendants seek suppression of all items of evidence seized in New Jersey, claiming absence of probable cause for the search warrants issued by the New Jersey Court, and suppression of all evidence obtained in Florida by reason of the claimed illegality of the arrests there, including suppression of the confession by Graham as a result of said arrest, and of the inculpatory statement made by Lucas. They also seek suppression of the fingerprints found in the trunk of the car, of Lucas' hat, etc. Miscellaneous other grounds are suggested by defendants for the suppression of all the foregoing.

Defense counsel argued strenuously that, with respect to the New Jersey searches, the Florida warrantless arrest, search, seizure and confessions or admissions, that New Jersey and Florida laws, respectively, apply. They maintain that under the laws of such States, the evidence obtained in said States should be suppressed pursuant to applicable case and/or statutory law in said States, respectively.

This Court is by no means convinced that New Jersey or Florida laws differ significantly in their application to the

facts here from New York law. No expert testimony was offered with respect to the laws of such States, although citations of New Jersey and Florida cases and Florida statutes were made in their briefs.

Thus, a threshold question must be determined by this Court, i.e., whether the laws of such States are to be applied with respect to the evidence sought to be suppressed obtained in such States, or whether our own laws govern with respect to the admissability of such evidence.

Counsel have cited no cases bearing upon this conflict of laws question, and, indeed, this Court has not been able to unearth any New York case dealing with this conflict of laws problem in the criminal law area.

Turning to other jurisdictions faced with this question, there are cases persuasive, however, on this point. In Burge v. State, 443 Sd 2d 720 (1969) the defendant was convicted of burglary and attempted rape in Texas. He was a resident of the State of Oklahoma, and while he was in Texas custody, his wife, at his Oklahoma residence, permitted police officers to search their home in Oklahoma without a warrant. Contrary to Texas law, Oklahoma grants to each spouse a personal right to demand a search warrant for the search of the marital residence. Upon said search which was made without the consent of the defendant, incriminating evidence was found and admitted at the Texas trial.

The Texas Court found the question to be evidentiary and procedural in nature, and thus governed by the law of the forum, and affirmed the conviction.

In People v. Sailen, 49 Ill. 2d 504, 275 N.E. 2d 131 (1971), the Supreme Court of Illinois, faced with the same problem,

adopted a better approach, applying the "significant relationship" or "center of gravity", conflict of laws rule. The defendant in said case was convicted in Illinois of conspiracy to obstruct justice by concealing the body of a murdered victim on his farm in the State of Indiana. The victim had been murdered in Illinois, her body transported to and buried on the defendant's farm in Indiana.

As a result of certain information obtained by the police as to where the body was buried in Indiana, an Illinois police officer obtained a search warrant from a judge in Indiana, searched at the farm and recovered the body of the victim. The affidavit upon which the search warrant was predicated was based upon hearsay information and conclusions of the police officer, clearly insufficient under Indiana law, although adequate under the law of the forum state, Illinois. The evidence was admitted at the Illinois trial.

The Illinois Supreme Court, citing Burge, supra, and other authorities, upheld the conviction.

The Court pointed out that, traditionally, conflicting principles prescribed that issues of clearly procedural nature are governed by the laws of the forum, whereas substantive matters are controlled by the laws of the state where the transaction occurred. Yet, with respect to conflicting state views concerning Fourth Amendment and other rights, the law has been changing and the older rules are being replaced by more flexible rules such as the rule "significant relationship" with each of the states in question. The Court went on to say that if the problem presented was considered from the procedural-substance viewpoint, that the

evidence was properly admitted for two reasons, i.e., that evidentiary questions are generally governed by the laws of the forum and secondly, that if the conflict concerning the choice of law involves the preliminary issue of whether the evidence was wrongfully obtained, a substantive matter, then from the viewpoint of the "significant relationship" or "center of gravity" rule, the significant contacts in that case were with Illinois in that the crime was committed there, was being prosecuted there, defendant was a resident there, the great majority of witnesses were Illinois residents, that Indiana had no vital contact with the crime, and that the application of Illinois evidentiary law would not offend the unity of interstate relationships between Indiana and Illinois, and affirmed the conviction.

Thus, we see that the Illinois Supreme Court applied the modern conflict of laws rules applicable in the civil area to the criminal case before it.

We can also analogize, in the civil area, to New York cases on the subject. The trend in our state has also been to apply the law of the state which has the strongest interest in the resolution of the particular issue presented. Reference here to only several of the many New York cases on the subject should suffice.

One of the earlier and leading cases is Babcock v. Jackson, 12 N.Y. 2d, 473 (1963), dealing with tort liability. In Babcock New York people went in a New York registered automobile for a weekend trip to Canada. An accident occurred in Ontario causing personal injuries to one of the New York passengers. Ontario forbade a suit by the passenger against the driver owner.

In the New York suit, defendant moved to dismiss the complaint on the basis of Ontario law. Special Term granted the motion, and the Appellate Division affirmed.

The Court of Appeals reversed. Reviewing the history of this conflict of laws question, the court held that the substantive law to be applied would be that of the state which has the strongest interest in the resolution of the particular issue presented.

This approach has been referred to as the "interest analysis" approach.

In Farber v. Smolack, 20 N.Y. 2d 198, another negligence case, all parties were residents of New York. Defendant was the owner of the automobile loaned to the others for a trip to Florida. On the return trip, and in North Carolina, there was an accident as a result of which an action was brought in New York by the administrator of one of the deceased passengers killed in the accident and guardian of an infant injured therein as well as by another passenger. There was a difference between New York and North Carolina law with respect to the issue of liability of the owner. The North Carolina law required the jury to find that the use of the automobile was for the absentee owner's benefit in order to impose liability. The court followed Babcock, also citing Macoy v. Rozbicki, 18 N.Y. 2d 289 (1966) in applying New York law.

Also following the "interest analysis" approach with respect to a contract involving the Statute of Frauds is Intercontinental Planning, Limited v. Daystrom Incorporated, 24 N.Y. 2d 372 (1969(, in which the court said;

"However, as we view this case, it is

> unnecessary to characterize the Statute of Frauds as either substantive or procedural since New York law should be applied in either event. If the statute be viewed as procedural, there is no problem since the law of the forum would be applied. Likewise, New York's Statute of Frauds would be applied as the law of the State whose law governs generally if the statute be considered substantive since New York has the paramount interest in the application of its law in this case. (Cf. Matter of Crichton, 20 N.Y. 2d 124, 133; Matter of Clark, 21 N.Y. 2d 478, 486; cf. Miller v. Miller, 22 N.Y.2d 12, 15-16.)"

See also Tooker v. Lopez, 24 N.Y. 2d 569, (1969), an automobile accident case in which both the majority and minority of the court used the "interest analysis" approach, but differed with respect to its application to the facts in that case, referring also to same as "grouping of contact" or "center of gravity" (p.590) and "contact theory or governmental interest theory" (p.596). The dissenting justices felt that the law of the place of the accident should govern the conduct and qualifiedly the status of persons, residents and non-residents, within it, except in the extraordinary situation where the localization of persons and conduct is adventitious. They felt that under the particular facts of that case the greater contact and stronger interests were with the state in which the accident had occurred. It is interesting to note that Associate Justice Jasen, concurring in the dissent, had authored the opinion for the majority in Intercontinental Planning, Limited, supra, handed down two weeks earlier.

A third line of cases refer to the deterrent effect on police conduct if an illegal search in a different jurisdiction were suppressed. Of course, we all understand that searches, arrests and

confessions made in violation of Fourth and Fifth (and Fourteenth) Amendment rights are to be suppressed wherever made. However, a forum court can make its own determination of constitutionality, subject to overriding federal case guidelines. Where evidence is illegally obtained, in violation of local law, but not rising to constitutional proportions, the forum court can select the law to be applied, and consider, in addition to the preceeding approaches of Burge, supra, and Saiken, supra, the deterrence approach.

In People v. Orinsky, 40 Cal. App. 3d 935, 115 Cal. Rptr. 529 (1974), Indiana police received consent from defendant's wife to search the marital residence in connection with a local Indiana crime. Upon such search the police found evidence of a California crime, and transmitted same to California authorities who initiated a prosecution there, the court holding such evidence admissable under California law despite its illegality under Indiana law. The Court applied the "governmental interest" approach. It also examined the deterrent approach, the reason for the exclusionary rule, and found that police conduct in Indiana was not "dirty business", and that the police conduct was proper under California law.

A New York case dealing with a confession made in California is People v. Davis, 55 A.D. 2d 969. Although the conflicts of laws question was not discussed, the Second Department held, with citation of Federal and several New York cases, that a confession

obtained from defendant upon his arrest in California violated his 6th amendment right to counsel, and suppressed the same. The cases cited by the court, and relied upon by the court, did not involve conflict of laws questions. The Second Department evidently simply applied New York decisional law in determining whether the California confession should be suppressed.

Applying the foregoing principles to the case at bar, it is apparent that the State of New York has the greatest interest in this case, including the New Jersey searches, the Florida arrest, searches and confessions or admissions.

The alleged murder, kidnapping and robbery occurred in New York State, of a New York State citizen. The defendants were at least residents, if not domiciliary, of New York. Almost all witnesses in the New York prosecution are New York residents.

This Court will not say that neither New Jersey nor Florida have any interests in this case, as undoubtedly those states do have an interest in police conduct towards transients or visitors within their respective territories. But such interests are minor when compared to the overwhelming New York interests in prosecution of such heinous crimes as here committed amongst its own residents on its own soil. Indeed, the police activity in New Jersey and Florida was mainly conducted by New York State Police officers with the assistance of police officers in said states and the use of facilities in said states in aid of the New York State police officers.

Further, the application of New York law in this instance would not offend the comity of interest relationship between New York and the other states involved.

Nor would the police conduct in New Jersey or Florida, if illegal (which this Court does not find) require suppression as a deterrent.

Accordingly, this Court will apply New York law with respect to the New Jersey and Florida transactions, subject only to overriding federal law dealing with safeguarding Fourth and Fifth Amendment rights of these defendants.

The facts made known to the New Jersey Court were done so under oath. Even though the transcript of said application indicates the oath having been administered to Investigators Chandler and Ovens during the recorded and transcribed portion of the proceeding, Chandler's testimony that said oath was actually taken by him prior to his unrecorded testimony to said court is not only uncontradicted, but defendants were given the opportunity to verify same with the New Jersey Court and call the judge as a witness, which this Court would arrange, but, after discussion by counsel with said court, they did not call him.

In determining whether or not there was probable cause for the issuance of a search warrant, the critical facts and circumstances for the reviewing court are those which were made known to the issuing magistrate at the time he determined the warrant application. (People v. Nieves, 36 N.Y.2d 396, 402; People v. Hendricks, 25 N.Y. 2d 129, 138; People v. DeLago, 16 N.Y. 2d 289, 292, cert. den. 383 U.S. 963; People v. Rainey, 14 N.Y. 2d 35,38). See also People v. Brown, 40 N.Y. 2d 183, in which a search warrant was upheld even though an informant was interviewed by the issuing magistrate without being under oath, and without his testimony being recorded, although the same was referred to later by the court on the record.

The Fourth Amendment to the U.S. Constitution, and Article I, Section 12 of the New York Constitution require that search warrants be issued only upon probable cause supported by oath or affirmation. A written application in affidavit form is not absolutely required. An example in New York is the People v. Brown case, supra, where an oral application under oath by the police officer, and an off-the-record discussion with the informant, whose information was essential for probable cause, was held to be sufficient, and in substantial, if not literal, compliance with C.P.L. 690.35 (1).

In the case at bar, there was clearly a sufficient basis for the New Jersey Court to find probable cause for the issuance of a warrant for the search of the Lincoln automobile. And the securing of a warrant by the police will presume their bona fides and the subsequent search upheld in a doubtful or marginal case (People v. Hanlon, 36 N.Y. 2d 549, 556), although I do not consider the probable cause issue here to be doubtful or marginal. See also(Ker v. California, 374 U.S. 23).

The automobile itself became evidence in this case, particularly after the finding of deceased's fingerprints in the trunk interior, and, with the authority of the New Jersey Court, properly removed to New York.

Nor does the claim by defendants that the car was searched on October 17, and again thereafter, and dusted for fingerprints on the 20th indicate any improper or unauthorized conduct by the police. The car was constantly under surveillance by the police, and after obtaining the search warrant, they took possession of the keys and maintained constant control over the car in carrying out the search and testing for fingerprints, which they

were authorized to do.

This Court also determines that the arrest of the defendants in Florida, as it turned out to be without a warrant, was lawful upon several grounds.

This Court finds as fact that the arrest of the defendants was for the purpose of apprehension and prosecution for the mentioned crimes, and not as a subterfuge for an otherwise unlawful search or interrogation.

At the outset, it is clear that an interstate bulletin (teletype message) can furnish probable cause for a warrantless search (People v. Lypka, 16 N.Y. 2d 210). So, too, can police officers make an arrest upon a radio bulletin, telephone or teletype alert from fellow police authority (Whitely v. Warden, 401 U.S. 560, 568; People v. Horowitz, 21 N.Y. 2d 55, 60). However, despite the foregoing, on a suppression hearing the defendant may question the basis for such communication, and ultimately, upon such hearing the People must demonstrate that the sender or sending agency itself possessed the requisite probable cause to act (People v. Lypka, supra, and cases cited therein).

Under C.P.L. 140.10 a police officer may arrest upon "reasonable cause" to believe that the person has committed a crime. "Reasonable cause" in such context is the same as "probable cause" as such latter term is used in the Fourth Amendment (Draper v. U.S. 358 U.S. 307, 310; People v. Fields, 50 A.D. 2d 670; People v. Lombardi, 18 A.D. 2d 177).

"Probable cause" has been defined as a reasonable ground for belief of guilt, which is less than would justify

conviction (Brinegar v. U.S., 338 U.S. 160, People v. Fields, supra).

Not only did the Florida police have the teletype communication directing the arrest, but the New York State police officers were physically present and had conferred with the Florida police officers, filling them in on all the facts which were the basis for probable cause.

Accordingly, finding probable cause for the arrest of defendants, this Court holds that same was lawful.

Additionally, the police officers had the genuine belief that the New York arrest warrant had been issued on the 18th.

The Florida police, in effecting the warrantless arrest, did so in a manner consistent with New York law. Under C.P.L. 570.34 a police officer may arrest a person without a warrant "upon reasonable information" that the accused stands charged in another state for a felony.

The arrest of the defendants did not violate any of their Fourth Amendment rights.

The entry into the motel room by use of a passkey obtained from the motel manager and by entering through an unlocked door from an adjoining room, but without advance notice was justified in view of the facts that the murder weapon had as yet been undiscovered and there was reasonable grounds to believe that defendants were so armed, that they had a vicious dog, all of which would endanger the safety of the arresting officers, and

could also result in the destruction of evidence (C.P.L. 140.15, subd. 4, and C.P.L. 120.80, subd. 4). (See also Warden v. Hayden, 387 U.S.294).

The Court finds that the search of the 2 motel rooms occupied by the defendants and their female companions did not violate their Fourth Amendment rights, for 2 reasons, i.e., as incidental to the lawful arrests the police were entitled to search within the room of each defendant for the murder weapon and evidence (Chimel v. California, 395 U.S. 752; People v. Fitzpatrick, 32 N.Y. 2d 499, 508; Amador Gonzales v. U.S., 391 F. 2d 308 with respect to fruits of the crime, instrumentalities used to commit the crime, contraband, material which constitutes evidence of the crime or that the arrestee committed same), and secondly, the need for the Florida police to inventory, remove, and safeguard the contents, being unsure of the status of the women at the time of the arrests of the defendants.

The confession of Graham after extensive and repeated "Miranda" warnings, commenced within 3 hours of his arrest and 2 hours after his arrival at the Broward County Sheriff's office, was voluntary and after intelligent and knowing waiver of his rights to remain silent and counsel. There is no credible evidence in this record of any overreaching by the police, mistreatment, nor any other police conduct to taint the same. This Court has also had the benefit of listening to the tape recording of same, and agrees with the testimony of the police officers that Graham desired to be "cooperative".

It should here be pointed out that if, arguendo only, there were any infirmity in the arrest, that the confession is

nevertheless admissible.

In People v. Martinez, 37 N.Y. 2d 662, the court held that a confession made after an unlawful arrest and search was so attenuated from the search as to permit use of same.

However, in suppressing a confession made immediately after an unlawful arrest, in People v. Stewart, 41 N.Y. 2d 65, 70, the Court shed more light on when a confession is or is not to be considered so integrally related to the unlawful arrest as to require suppression, or so attenuated as to permit the same in evidence. In Stewart, supra, the police officer stopped defendant on the street pursuant to a police radio call based upon an anonymous tip to the effect that a person bearing defendant's description had a gun, frisked defendant unlawfully, searched and seized bullets and a gun. Upon questioning at the station about the gun seized, Stewart confessed to a robbery during which he acquired the gun. The items were suppressed, the Court saying: "In contrast to Martinez, the interrogation here was conducted by the same officer within a limited time frame, and the fruit of the arrest, the gun, was an integral part of the subsequent admission" (70).

In distinguishing Martinez, the Court said: "The key factors in Martinez were the absence of a purposeful exploitation of the initial illegality by the police, the lack of a casual link between the challenged police conduct and the statements made and the existence of a valid independent basis for the subsequent interrogation."

This Court believes the Martinez key factors to be present here. In arresting Lucas and Graham the police acted in the

good faith belief in probable cause, and their purpose was not interrogation, but prosecution. There was no "purposeful exploitation" of the arrest, as all the probable cause factors, if not justifying an arrest, warranted interrogation of the defendants, at the very least, for which there was a basis valid and independent of the arrest. For the same reasons, the arrest was not the cause for the interrogation.

In Brown v. Illinois, 422 U.S. 590, a 6 member majority of the Court suppressed 2 confessions made after an illegal arrest and search. The majority pointed out that the exclusionary rule is calculated to deter the police from engaging in violating constitutional rights by removing the incentives to disregard them (599,600) but made clear that despite its broad deterrent purpose, the rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons, citing cases (600). The majority then went on to hold that the Michigan Court's reliance solely upon intervening Miranda warnings, as a Fifth Amendment safeguard, was insufficient to cleanse the Fourth Amendment violation (to which the purpose of deterrence also attaches). The majority then went on to point out the evil of unlawful searches and seizures for the sole purposes of investigation or interrogation. The majority suppressed the confessions because the search of defendant's apartment and his arrest were clearly without probable cause, known by the police officers to be unlawful, "the flagrancy of the official conduct", the police admitting in their testimony that the purpose of the arrest was

"for investigation" or for "questioning" (604,605).

The remaining 3 justices wrote 2 concurring opinions wherein Mr. Justice White concurred on the grounds that the police "knew or should have known" that the arrest was absent probable cause, while the remaining justices, concerned with the cost of applying the exclusionary rule as a deterrent, would apply the same to flagrant official misconduct, and would allow the confessions where "effective" Miranda warnings were given, and the ensuing confession were voluntary in the Fifth Amendment sense (612).

It can thus be seen that as recently as June 26,1975, it was the feeling of all of the justices of the Supreme Court that even though the search or arrest may be unlawful, if the police acted in good faith, believing there to have been probable cause (believing an arrest warrant to be in existence), the arrest being for the purpose of prosecution and not for the purpose of investigation or questioning, having an independent basis for questioning, and the intervening effective Miranda warnings, that the confession should not be suppressed.

The foregoing discussion in this opinion which assumes, arguendo only, that there was inadequate probable cause for the arrest should not be interpreted to mean that this Court doubts there was probable cause, but, instead as merely a recognition of its fallibility.

The inculpatory statement made by defendant Lucas on the airplane returning to New York was made without there having been any violation of his constitutional rights. After having been given his Miranda warnings on several occasions in Florida, he refused to talk to the police officers. According to his own

testimony he was well treated and not questioned further. On his appearance before a Florida Court where he waived extradition, he requested, and was furnished, with counsel to whom he spoke. On the airplane, defendant initiated a conversation with Investigator Reidy, and was again advised that anything he said would be used against him. Despite this warning, and without any interrogation, he enquired about whether he could deal with the District Attorney, that he may have been involved in the crime, but did not do it all himself, or words to that effect. Defendant, in his testimony merely denied having made this statement. This issue will be for a trial jury to determine.

There is no requirement that the police stop a person from volunteering a confession or admission, nor are such volunteered statements barred by the Fifth Amendment (Miranda v. Arizona, 384 U.S. 436, 478; People v. Gary, 31 N.Y. 2d 68; People v. Kaye, 25 N.Y. 2d 139).

The search warrants of October 20 for the 2 safety deposit boxes in 2 New Jersey banks were supported by affidavits clearly showing probable cause, based upon the evidence used to obtain the search warrant for the car, the confession made by Graham who described the transactions with the banks and the hiding by him and Lucas of money from the robbery therein. Search warrant returns were all filed with the New Jersey Court and said court, by order, authorized all seized items (including the car) to be removed to New York.

In this regard it is important to note that Roberta Holmes, called by defendants, testified that she had no objection to the police taking the keys from her purse. Both she and

defendant Graham testified that Graham had given her the keys on October 14 in New Jersey. Consequently, the safety deposit boxes in New Jersey would have been discovered by the police in any event.

For reasons previously stated, the cowboy type hat inadvertently left by Lucas at the New York State Police barracks after being processed was not the product of any search. Upon realizing that it had evidentiary value, the police simply kept and have refused to return it.

It appears that the police are still in possession of many items of personal belongings and property of the defendants which were the result of the automobile search and inventory in the motel rooms, which have no evidentiary value. The District Attorney shall be directed to turn these non-evidentiary items over to such persons as the defendants, presently incarcerated, shall direct.

All motions to suppress physical evidence, the confession of Graham and the inculpatory statement of Lucas are denied.

The District Attorney shall submit the order hereon.

DATED: June 16, 1977.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 19th day of June, 1980.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice
HON. MICHAEL E. SWEENEY
HON. T. PAUL KANE
HON. ELLIS J. STALEY, JR.
HON. J. CLARENCE HERLIHY,
Associate Justices.

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STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Indictment No. 67-75

RICHARD B. GRAHAM,

Appellant.

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The appellant, RICHARD B. GRAHAM, having appealed from a judgment of conviction of the County Court, County of Sullivan, rendered on the 3rd day of November, 1977 upon a verdict convicting the defendant of two counts of murder in the second degree, kidnapping in the first degree and robbery in the first degree, and by order of the United States Supreme Court dated May 12, 1980 the above matter was returned to the Appellate Division, Supreme Court of New York, Third Judicial Department, for further consideration, and pursuant to said order said appeal

having been presented during the above-stated term of this Court and having been argued by STEPHEN L. OPPENHEIM, ESQ., of counsel, for appellant, and by STEPHEN F. LUNGEN, ESQ., as special prosecutor for the respondent, and, after due deliberation, the Court having rendered a decision on the 31st day of July, 1980, it is hereby

ORDERED, that the judgment be modified, on the law and the facts, by reversing the conviction of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

E N T E R ,

/s/ John J. O'Brien
JOHN J. O'BRIEN, CLERK

Dated and Entered: August 13, 1980.
A TRUE COPY:

John J. O'Brien
Clerk

# State of New York
# Court of Appeals

BEFORE: HON. LAWRENCE H. COOKE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

RICHARD B. GRAHAM,

Appellant.

CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Request for oral hearing denied (see CPL 460.20 [subd 4]).

Dated at Monticello, New York
December 26, 1980

Lawrence H. Cooke,
Chief Judge

*Description of Order: Order of the Appellate Division, Third Department entered August 13, 1980, modifying, on the law and the facts, the judgment of the County Court, County of Sullivan, rendered November 3, 1977, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and as so modified, affirming said judgment by convicting defendant of two counts of murder in the second degree.

*Description of Order

APPENDIX E

## APPENDIX F

Items Seized at Search, Airport Motor Lodge, Fort Lauderdale (Dania), Florida --- October 19, 1975.

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 46 | Approximately 100 photos in an album | 526, 555 |
| 47 | Travellers checks taken from wallet | 526, 527 |
| 48 | Checkbook | 526 |
| 49 | 2 Western Union receipts and Travel Lodge receipts taken from wallet | 526, 528 |
| 50 | Honda key and rent-a-cycle receipt taken from wallet taken from pants | 527, 528 |
| 51 | Receipt for safe deposit box and key found in wallet | 529-530 |
| 52 | Claim check for car in Newark | 530 |
| 53 | Western Union receipt, airline ticket receipt, American Express receipt for checks | 531 |
| 54 | National Car rental contract taken from briefcase | 531 |
| 55 | Timex watch, miscellaneous receipts, nail clipper, shield number from hook and ladder company in Walden, New York | 531 |
| 56 | Eastern Airlines ticket receipt taken from brown briefcase | 532 |
| 57 | Black address book, $145.88 in cash, comb taken from pants pocket | 533 |
| 58 | Receipt for safe deposit box, two red key cases each containing a key taken from purse of Roberta Holmes | 533 |

| | | |
|---|---|---|
| 59 | Taxi business card of Neil R. Bucklin taken from wallet | 533-4 |
| 60 | Travel Lodge receipt taken from pants pocket | 534 |
| 61 | Wallet taken from pants pocket | 536 |
| 62 | Longine watch, silver necklace, man's necklace man's gold wedding ring | 536 |
| 63 | Dog race track paramutual ticket and program | 536 |
| 64 | Brown plastic briefcase | 536-537 |
| 65 | Black leather briefcase | 537 |
| 66 | hat | 537 |
| | 4 Delta Airline ticket envelopes | 570 |
| | One pair of two-tone blue jeans | 593-595 |

One maroon T-shirt with collar. Pair of panty hose. One blouse, lady's blouse. Child's sweatshirt, "Parrot Jungle, Miami, Florida", written on it. Second child's sweatshirt, "Parrot Jungle," written on it. Lady's one-piece body shirt. A movie camera, taken from the room of R. Graham, Dania, Florida, Travel Lodge Motel, a Kodak Ektasound 140. And an OKAY used vehicle dealer warranty to Cheryl Kilb of Newburgh, New York. A mascara applier. A chain containing a Jewish star in silver color. A plastic bag from Parrot Jungle with the name Cheryl on it. Paper bag. A Kodak camera case, town tones, of brown leatherette, containing an instruction book for Polaroid SX-70 Land Camera. And two SX-70 Polaroid Land Cameras. That completes the contents of the brown suitcase.

In the first box is a pair of chino men's pants. Pair of brown men's pants. A brown embroidered western man's shirt. A brown man's suit jacket. A green, white and blue man's Hawaiian type shirt. Brown man's leisure suit jacket. A brown type work leather belt. A white T-shirt, man's, with "Port Lauderdale,

Florida," and birds on it. A man's green shirt. Pair of red and white polka-dot men's swim trunks. A white man's sleeveless T-shirt, undershirt. Another undershirt. A third undershirt. Two pairs of men's white Jockey shorts. Pair of blue socks. Pair of black socks. Two black combs. A tie clasp in the form of a truck. And another tie clasp with two horse symbols.

In the second box is a men's beach shirt which matches the swim suit. A blue floral shirt. A blue and light brown and gold man's shirt. Pair of under shorts, red, black and blue and white. Another pair of under shorts, red, blue and white in block design. A man's white sleeveless T-shirt. Pair of man's brown pants. A man's blue with light piping cabana shirt. A pair of swim trunks wich matches the cabana shirt. A blue man's leisure suit jacket. A light blue pair of pants. A man's light blue leisure jacket that matches the last pair of pants. A man's brown leather belt. A pair of dark blue and light blue diamond pattern design -- two pair of black men's socks in original wrapping. Pair of brown socks. And another belt, leather on one side, suede, rust color, on the outside.

Items Seized but later returned to other persons

| Description | Described at P/A page |
|---|---|
| Automobile | 366 |
| Motorcycle | 366 |
| 2 While motorcycles helmets | 369, 569-70 |
| Brown lady's purse | 369 |
| Miscellaneous papers of Cheryl Kilb | 369 |
| $47.87 in cash | 369 |
| Brown suitcase with miscellaneous women's toiletries | 369 |
| Lady's suede purse | 370 |
| $24.54 in cash | 370 |
| Items of men's clothing | 587 |

## APPENDIX G

Items Seized in Search of Lincoln Automobile at Gateway Downtowner Motel, Newark, New Jersey, October 17, 1975.

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 1 | Bag with assorted rags | 33 |
| 2 | Vacuum sweepings from various areas of car | 34 |
| A. | Vacuum sweepings from right front inside | 34, 55 |
| B. | Vacuum sweepings from rear seat | 34, 56 |
| C. | Vacuum sweepings from left front | 34, 56 |
| D. | Vacuum sweepings from left rear | 34, 56 |
| E. | Vacuum sweepings from right front interior | 34, 56 |
| F. | A hair from trunk | 34, 56 |
| G. | Vacuum sweepings from right rear interior | 34, 56 |
| H. | Vacuum sweepings from trunk interior | 34, 56 |
| I. | Ashtray contents | 34, 56 |
| 3. | Miscellaneous papers from trunk of car consisting of: | 34, 57-62 |

envelope of the Empire National Bank stamp dated August 19, 1975, and an envelope of one Goldenning Place stamped date July 15, 1975, sealed. Mobile receipt for $10.30, January 28, 1975. Empire National Bank 24 hour teller receipt of July 1, 1975 the amount of $50, 1520297. A piece of small note paper addressed with Honey and signed Sheryl. A box rent receipt, United States Post Office, Walden, New York, June 19, 1975 to R. Lucas, #233. Bank Americard receipt for $5.25, June 25, 1975 to Richard Lucas. Empire National Bank receipt for the sum of $300 dated June 25, 1975, serial number 151461. A receipt. truck stop of Pennsylvania, amount of $7.06, June 6, 1975. A receipt of J.I. Russa & Son Jewelers, Walden, New York, dated March 26, 1975 in sum of $31.20; A note on the back of a piece of paper headed miscellaneous general voucher containing the name Leland Sisson

a letter of Highland Telephone dated August 6, 1975 addressed to Richard P. Lucas; a receipt of Rhulen Sisson to Richard Lucas Lucas dated May 29, 1975 showing a bank balance of $100; a receipt of Rhulen Sisson to Richard Lucas dated May 29, 1975 for $160 rent; a receipt of Leland Sisson to Richard Lucas dated August 7, 1975 for $160/rent; a Bank Americard receipt for $10.30 dated June 26, 1975 for the for of East Stroudsberg, Pennsylvania; Union 66 receipt of June 5, 1975, $7.85 to Richard Lucas; Empire National Bank 24 hour teller receipt dated July 17, 1975 the sum of $239.36, 153200 is the serial number; Empire National Bank 24 hour teller receipt dated July 9, 1975 for the sum of $250, number 152673; a wage deduction sheet of Cooper-Jarrett, Inc. for June period ending June 14, 1975 showing the net pay of $395.50, check number 276011; Empire National Bank 24 hour teller receipt of June 5, 1975, the sum of $190.77, 1150565; a Carrol's matchbook with writing figures on it; a small piece of note paper dated May 3, addressed to whom it may concern, signed Carol A. Lucas; an Empire National Bank checking account miscellaneous debit of March 24, 1975 contains inward to close the account; an envelope with a window containing a notice from the general notice acceptance, layed claim due dated August 5, 1975; a Bank Americard receipt to Richard Lucas from Rob Rohl, Inc., in the sum of $6 dated June 21, 1975, Bank Americard receipt to Richard Lucas from the Truck Stops of America dated June 22, 1975 in the sum of $8.25; Empire National Bank 24 hour teller receipt of August 7, 1975, serial number 1545, $276.50; Empire National Bank 24 hour teller receipt Dated August 2, 1975, 154227 in the amount of $236.33; Empire National Bank 24 hour teller receipt dated July 21, 1975, 153511, in the amount of $50; Empire National Bank 24 hour teller receipt dated July 24, 1975, 153652 in the amount of $50; Empire National Bank 24 hour teller receipt dated July 26, 1975, 153762 in the amount of $25; Empire National Bank 24 hour teller receipt of July 26, 1975, 153761, $25; Empire National Bank 24.

hour teller receipt of August 7, 1975, 154523, in the amount of $50; Empire National Bank 24 hour teller receipt of August 7, 1975, 154524 in the sum of $25; Empire National Bank 24 hour teller receipt of August 14, 1975, 155013 in the amount of $50; a check of Richard Lucas, 198 drawn on the Empire National Bank to Night Market, $10; check to Richard Lucas, 191, of August 7, 1975 to Leland Sisson $160; check of Richard Lucas, 189, Leland Sisson, $190; check of Richard Lucas number 195, August 12, 1975, Grand Union, $10; check of Richard Lucas, 197, August 13, 1975, Commissioner of Motor Vehicles, $10.25; check of Richard Lucas, #194, Night Market, August 7, 1975 for $10; check of Richard Lucas, #196 of August 13, 1975, Daniels & West, $17.53; check of Richard Lucas of August 5, 1975, #193 to the Grand Union, $10; check of Richard Lucas, #188 of July 21, 1975 to the Grand Union, $15; check of Richard Lucas, #190 of August 1, 1975 to the General Motors Acceptance Corp., #154 then I have a check of #185 July 22, 1975 to Charlie's Market, $10; check of Richard Lucas, #187 of July 27, 1975 to Florence Lucas, $25; #186, Richard Graham of July 25, 1976, $24; a check of Richard Lucas #184 July 17, Prudential Insurance Company, $25.42; check of Richard Lucas #182 Metropolitan Life Insurance Co., $27.05 of July 17, 1975; check of Richard Lucas #174, to the Prudential Insurance Co. for the sum of $25.42 of June 30, 1975; #1832 BAC, July 17, 1975, $50; statement of account of Richard Lucas for the period opening July 18, 1975 and dated August 15, 1975; an envelope of the Highland Telephone Co. addressed to Richard Lucas, wage statement of Cooper-Jarrett, Inc. for the period ending July 12, 1975, in the sum $239.36 for check #281637; wage statement of Cooper-Jarrett ending for the period of July 26, 1975 in the amount of $236.83, check #284269.

MR. OPPENHEIM: Wage statement for check #278859 for the period ending June 28, 1975, net pay $51.04; wage statement for check #2828-16 for the period ending July 19, 1975; wage statement for check #780108 for the period ending July 5, 1975; wage statement for check #27-3885 for the period ending May 31, 1975; Bank Americard receipt from the Truck Stops of Pennsylvania to Richard Lucas, dated June 22, 1975 for the sum of $3; wage

statement for check #274421 for the period ending June 7, 1975 to Reichs Banknotes for 20,000 marks but I don't know what kind of marks; a personal money order receipt of the Empire National Bank of April 28, 1975, #145628 to the Orange County Probation Department; a wage statement for check #2727 -- period ending June 21, 1975;

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 4 | Miscellaneous papers from the car consisting of: | 35, 65-6 |

a plastic flag, from Great Adventure, Sheryl; a drawing signed Bevins, dated October 11, 1975 with writing on the back, Virginia Bevins; a printed slip of Eastern Airlines bearing the writing flight number 157 having bi-centennial terms on it; a receipt #260941 Holiday Inn of Daytona Beach, Florida, covering the period of October 9, October 12, portion of an Eastern Airline ticket, stamped October 8, 1975, NYC Kennedy to Daytona Beach; a card with back writing including flight number 157; a piece of lined note paper with various writing including, "dad, wake me up before you go to work"; an American Express Card application, signed Richard B. Graham, Sr., October 8, 1975, Eastern Airlines envelope with a ticket -- package stub attached for flight 157 to Daytona Beach, that's flight 157Y; an envelope of the Holiday Inn west of Daytona Beach addressed to Mrs. Anthony Parisi with a letter inside dated October 8 addressed Gram and signed "love always, Richie."; portion of an Eastern Airlines special service ticket #229623, stamp dated October 8, 1975; small piece of unlined note paper having on it various writin including Avis 253-8133; an envelope addressed to the Spivak Agency Inc. having a handwritten notation on it of flight 106;

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 5 | Papers from right front of car consisting of: | 35, 66 |

a crumpled package of Benson & Hedges cigarettes, a package of four cigarettes, wrapper from a piece of Wrigleys doublemint chewing gum; a matchbook, more cigarettes; a matchbook, Foodtown;

Page Missing from
Filming Copy

1521542139700; a receipt of Tony's Parking and Lockers #2341; a membership card in plastic of Blackrock Fish and Game Club, 1017; a plastic card of the Wife Swappers Club International a membership card of Blackrock Fish and Game Club, #186; a receipt of J.C. Penny Co., Inc., 673631 for the sum of $56; a color photograph in the bag says to Jeff with love always Birdie; another card of Wycrest Corp., #5619951; a group information card of the Hartford Life Insurance Co., Hartford Life and Accident Insurance Co., Hartford Accident and Indemnity Co., policy holder being the Wycrest Corp; a slip of paper receipt of May 9, 1975 for $140 from Jay Jay McCord; a green office memo of July 19, 1975 being a thing of certain items sold to Edward J. Halford; slip of paper with the name Dana to Reesa Wolhrab and other writing; a claim check of Radio Shack, May 24, 1975, #164875; a receipt of Walden Auto Parts, Inc., #10257 of January 30, 1975, the name of Walt Kendy on the back and other figures; a receipt of Gulf, #B2549632, $25 marked paid in full; a repair tag and invoice of Radio Shack, #033836, dated May 10, 1975; a club member card of Ice Cave Mountain, 1974 in the name of Iris Agroyan; a card of Newburgh Part Motors, Inc. with the word Tex and numbers on the back; a penny arcade photo of a girl with writing on the back, "to Richie with all my love"; a selective service registration of Richard Barsley Graham, Jr.; notice of classification of Richard B. Graham, Jr., July 9,1969; receipt of something Weaverco, Inc. of June 17, 1975 in the sum of $25.30; customer signature card of Richard B. Graham, #634-3L7 and a resident fishing license #RF610309, for the period October 1, 1973 to September 30, 1974;

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 9 | Miscellaneous papers from glove compartment consisting of: | 37, 69-81 |

a red leatherette Texaco road atlas; envelope, P.O. Box #861, Middletown, New York, of August 25, 1975, containing Bank Americard statement to Richard Lucas for the billing period

8/21/75, also including a blue notice, Bank Americard is now past due; a purchase of Mobile Oil Corp. of July 28, 1975 for the sum of $10.30; and a pamphlet which starts, "most people like puzzles, but not when it comes to paying bills."; envelope of P.O. Box #862 of September 25, 1975 containing a Bank Americard statement, billing period September 22, 1975, a blue slip saying, "your Bank Americard is now past due"; and a card dated October 17, 1975 showing a balance of $804.39; a purchase of Sunoco of $11.75 of August 31, 1975; a purchase card of Sunoco of August 30, 1975, $12; a purchase card of August 29, 1975; Exist 31 Motel, $31.03; a purchase card of Blue Ridge Motel of August 30, $29.96; a purchase card of the Mohawk Motor Lodge of August 27, 1975, $23.54; a Bank Americard flier headed "you may now request a cash advance from $50 up to your available credit line balance; mailing envelope flier; Bank Americard for the purchase of an all-weather jacket; an envelope of the Empire National Bank of Newburgh dated September 18, 1975 with a statement of Richard P. Lucas dated September 16, 1975 containing an Empire National Bank white and gray unfilled out check of Richard P. Lucas; 205, August 23, 1975 to a Neil Buckland, $12; check 277, September 4, to Beneficial Finance, $26.61; a check of Lucas, 202, August 20, 1975 to the Grand Union, $15; check of Lucas, 218, September 6, 1975, Village of Walden, $4; #214, August 28, 1975 for cash, $30; check of Richard Lucas, #199, 8/14/75, Charlie's Market; check #211 dated August 28, 1975, BAC, $50; #209, Leland Sisson's, in the amount of $190 of August 28, 1975; #207, August 26, 1975, Mike's Market, $10; #215, August 2 to the Holiday Inn, $2.26; check #216, September 2, 1975, cash, $30; #206, $8.25 to the Grand Union -- $25; #203, 8/21/75, to Charles Rakowski for the sum of $100; #204, Richard Lucas, Capitol Finance, $8.28; a check to Richard Forsyth in the sum of $180; check #208, August 27, 1975 to the Grand Union for the sum of $35; notice if insufficient funds and charges of the Empire National Bank, August 29, 1975, $15; notice of insufficient funds and charges, August 28, 1975 for a check of

$10; notice of insufficient funds of August 26, 1975 for two checks, one of $15 one of $25; an insufficient fund non-collected funds, returned check credited of the Empire National Bank, August 26, 1975, for the sum of $15; insufficient funds and uncollected funds, and return check credit of August 28, 1975, for $10; Empire National Bank 24 hour teller receipt of August 25, 1975 marked paid August 25, 1975, dated August 23, 1975, 155576 for $25; Empire National Bank 24 hour teller receipt of August 21, 1975 #1155446 for $25; an envelope of the Highland National Bank of Newburgh, September 2, 1975 containing a Continental Insurance Co. certificate of insurance on loan or account 00-18-6-2109; a Highland National Bank of Newburgh payment book which only payment stub one is taken out. The rest are here on account number 318002109; New York State Insurance indentification card issued to Richard P. Lucas, effective date September 12, 1975, expiration date, March 12, 1976; a plastic envelope containing a certificate of registration issued to Richard P. Lucas for a 1974 Lincoln, 9000-HQ; a retail installment contract signed by Richard P. Lucas, Daniels & West, Inc., dated August 12, 1975; a letter of Daniels & West, Inc., form letter with warranty, dated August 12, 1975; an envelope of New York State Department of Motor Vehicles dated August 21, 1973 containing a certificate card saying "contains certficate of title of a vehicle", New York State Indentification card to Richard P. Lucas, period June 12, 1975 to March 12, 1976; a form, MV50.2, used vehicle certificate of the Department of Motor Vehicles; odometer certification, Daniels & West, Inc. for a 1973 Chevrolet that's a yellow one; another one, odometer mileage certificate of Daniels & West, Inc. for a Lincoln Continental; a sales statement of Daniels & West, Inc. to Richard P. Lucas covering the 1974 Lincoln dated August 12, 1975; all of those items being in clear plastic envelopes; an envelope of William E. Cleary, Metropolitan Life, 603, Port Jervis, New York addressed to Richard P. Lucas containing a lot of blank envelopes stamped to William E. Cleary, Metropolitan Life, Box 603, Port Jervis

New York, the exact number of those envelopes, white envelopes, is ten; Western Union money order receipt, Mod, 905688, $100 to Carol Lucas; a box of the Empire National Bank addressed to Richard P. Lucas, inside the mailing box is another box, Spirit of America, inside that box is a flier for the Bicentennial American Revolution, Spirit of America checks; a green and white form bearing inspection #32695; a checkbook of Richard P. Lucas of the Empire National Bank going from check 251 to and including check 275 with unused deposit slips at the back; another checkbook going from #276 to 300 with unused deposit slips on the back and an envelope in green and white which has open lines for addresses, no addresses on it; and envelope with the printed stamp of Morristown, New Jersey, containing therein a receipt fo the Beneficial Finance System of September 17, 1975 showing a payment and other credit of $54; a flier of the Beneficial Finance System, special announcement for cousins, parents, etc.; a gray envelope bearing no writing on the outside except first class mail, place postage -- necessary postage here contining two windows; a form, BC30NYED, January '75 which starts out according to chapter 20, article 34 of the general business law of New York; an envelope from St. Lukes Hospital, Richard Lucas spelled L-U-K-U-S which as not been fully opened from which I can extract a balance due, bill of August 9, 1975, the sum of $69.25; a card of the Double R Electric Service, Inc. with writing on the back; a paper napkin; and a card of Brownell Motors, Inc.; card of the Mohawk Motor Lodge; receipt of Sun Oilof August 30, 1975, ticket 7020021 in the sum of $12; A Bank Americard receipt of August 31, 1975,, Mohawk Motor Lodge, $23.54; half a match cover of H.E. Harris & Co.; envelope with the words L & D written in hand outside and contained therein a summons with notice and action, Pearl Appliances, Inc. against Richard Lucas, to which is attache a schedule A, a bill of Pearl Appliances; an envelope from P.O. Box 563 addressed to Richard Lucas and containing therein a memo, Mgr., Finance Service, Inc., dated August 15, 1975; and a notice

to Assignor dated August 15, 1975 signed by R.G. Cervo; a checkbook of Richard Lucas containing one check filled out #213 dated August 28, 1975, Valley National Bank, and containing some money; unused deposit books; notebook page, September 9, 1975, Dear Luke, signed C and Tom; a card, pink card tatooing; a receipt of the Chauffeurs Warehousemen and Helpers of America for $12, August 15, 1975; another receipt of the Connecticut Turnpike for $50; customer receipt for United States money order, #19252126923, $25; the date is July 21, 1975; a piece of lined note paper, headed one-half cup cider, vinegar; a payment receipt of the Financial Service, Inc. for $8.21 of August 21, 1975; an envelope, first class mail prestamped, Des Moine, Iowa containing therein a receipt statement from the Financial Service, Inc., to Richard Lucas, dated September 23, 1975 and shows amount due of $92.25 and also contains therein an envelope with windows -- three windows and inside shows pink and white candy stripes; a card of Rick Porte with writing on the back; Bank Americard receipt to Richard Lucas of 8/29, sum $39.03; a book of matches from Shopwell; a comb; a Jarrett wage statement for check #228965 of August 9, 1975; a receipt of the Chauffeurs Warehousemen and Helpers of America, May 14, 1975 for the sum of $12; another card of tattooing with the word Richard and the #652-0950 written on it; a drawing card of the Wallkill Fire Department #117, another drawing card of the Wallkill Fire Department #123 and a Mobile receipt of $10.50 from L. Mirtallo; a receipt of the Chauffeurs Warehousemen and Helpers of America for $12, July 25, 1975; a receipt for voluntary surrender of registration of plates issued 8/12/75 to Richard Lucas; an envelope of the Motors Insurance Corp. dated July 18, 1973, Albany, New York containing a letter of Motors Insurance Corp. dated July 19, 1973 addressed to Richard P. Lucas; a form headed "agreement to provide physical damage insurance" dated July 19,1973; New York State Insurance identification card to Richard P. Lucas effective date March 12,

1974 to March 12, 1975; business reply mail postcard to the New York State Department of Environmental Conservation regarding a deer report; a registration to Richard P. Lucas for a 1973 Chevrolet pickup expiring April 30, 1974; odometer mileage statement on a Chevrolet dated July 19, 1973 attached to a car invoice, #9813A of Barge Chevrolet, Inc. dated July 19, 1973; a letter from the Department of Motor Vehicles addressed to Richard P. Lucas dated May 7, 1973; certificate of life insurance protection issued to Richard P. Lucas of the Credit Life Insurance Co., #A9576 effective July 19, 1973 and attached to that a certificate of accident and health insurance of the Credit Life Insurance Co. of July 19,1973 bearing the #A9576 also, a pamphlet for the official New York State Bicentennial Medal; retail installment contract between Lucas and Barge Chevrolet, Inc. of July 19, 1973; an envelope pamphlet of the New York State Department of Motor Vehicles with the heading "suppose your license were taken away"; a brochure, 1973 Chevrolet , light duty truck emission control systems; a warranty, 1973 Chevrolet truck, dated July 19, 1973; also contained in that envelope I am presently describing is another envelope of the Motors Insurance Corp. of August 1, 1973 in which there is a notice headed "important, your C.I.M. policy is enclosed"; a Motors Co. physical damage policy, family automobile form; an envelope addressed to the Motors Insurance Corp.; identification card, back headed "what to do in case of accident"; a Motors Insurance Corp. amendment, termination provision for New York; a statement for the policy covering period July 19, 1973 to July 19, 1974; an address book with invitations, wood grain cover, actually, it's not stamped on the front cover, A to A, index note-book, it contains addresses; a card of the Crawford & Co., writing on the back including grandma; a corner of an envelope with the number 561-6177; a room assignment card of the Exist 31 Motel of August 29; a card of the Walden Insuring Agency with writing on the back, 564-1660; 24 hour teller receipt of the Empire National Bank of August 14, 1975, #155012 in the amount of $244.85; a piece of

paper headed with the name Wayne on it; 24 hour teller receipt of the Empire National Bank of August 21, 1975, #155445 in the amount of $188.61; a card of Daryl Porn, Mgr., Texaco, writing on the back headed "Evelyn"; a deposit receipt of the Empire National Bank of August 3, 1975, -- no, that is September 4, 1975 in the sum of $200; a Bank Americard receipt of August 30, 1975 in the sum of $29.82, Blue Ridge Motel; Sun Oil Co., receipt August 31, 1975 sum of $11.75; a sheet of note paper headed "Joe Short."; an envelope, part of the envelope dated July 18, or June 18, 1975. It's not clear, it is addressed to Cheryl Crone with writing on the inside of the envelope; a card of Burtling Realty, Inc. with writing on it. Writing on the back headed, "mom"; a stub, Valley National Bank, Walden, New York of July 8, 1975 in the amount of $49.70; a receipt of Marie Boat, $4.00, September 6, 1975, #3305; a Mobile travel map of Colorado and Wyoming; a Texaco map of New York; a Sunoco map of New York; a Texaco map of Delaware, Maryland, Virginia, and West Virginia; a Texaco map of Maine, New Hampshire, and Vermont, and an unused self-postal envelope with a U.S. postage, Boston, 10 cents; an envelope of the Travelers dated September 18, 1975 including therein a card addressed, "Dear Policyholder."' a card in a red and white envelope with a Sears and Roebuck Co. dated August 18, 1975 containing therein a statement of of August 15, 1975 total due of $15.75; also containing a Sears advertisement for Charlie's perfume; business reply mail card to Allstate Insurance Co. and the business reply envelope to Sears, Roebuck & Co.; an envelope of P.O. Box #999, West Port, Connecticut stamped August 21, 1975 containing therein to the Danbury Mint, Medallic History of America, two coins in a card, an envelope addressed to the Danbury Mint and billing statement for $31 dated August 22, 1975; an unopened Bic Click Blue refill; a black Write Brothers medium point pen with cover; a shocking pink Bic Click pen; a piece of rubber tubing about two inches long; a red and clear plastic bic pen; a 5 cent piece, Buffalo, and another paper napkin;

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 10 | Papers secured from sun visor of car consisting of: | 37, 81-83 |

White envelope, State of New York Department of Motor Vehicles dated September 9, 1975. Inside the envelope is a certificate of title of Richard P. Lucas, #C1868132 with a letter entitled, "enclosed is the certificate of title of your vehicle."; a white envelope addressed to Casualty and Insurity, Davis and Life Casualty, Richard P. Lucas; white piece of paper with a yellow caution sign, caution sign which says, "your annual key fee is past due from Playboy Club."; a bill from the Playboy Club to Richard P. Lucas in the amount of $103.01, dated September 28, 1975; a letter addressed to the Play Boy Club International, Inc. on the face of the letter indicates "don't move an inch" with a picture of an optical tape measure; a document from the U.S. Department of Agriculture, Farmers Home Administration with an option to purchase real property, with a description of the property which should be conveyed to Barbara S. Faust, containing a description of the property, total price of $19,000 envelope dated October 6, 1975 containing a statement from the Playboy Club, inside it has an advertisement for 15 day free trial for a tire inflator; a base mail reply from the Playboy Preferred, Inc. an advertisement for a suede cowhide jacket; a piece of white scrap paper with the number 77813977 with the name Ronnie on the back and several numbers and figuring on the side; a white envelope from Etna Life & Casualty dated September 29, 1975, containing a letter to Richard P. Lucas from the Etna Life & Casualty; report on an accident dated 9/1975; an envelope from Sharon Yankow; an envelope from the Travelers, Hartford, Conn., dated September 10, 1975 containing policy identification number, Travelers Insurance Co. number 0089660841011; also containing a black-blue envelope; white and green bordered first class mail envelope with no address containing a receipt from the

Beneficial Finance Co; also containing a special announcement to cousins, uncles, grandparents, friends, containing two of those I just read; yellow paper reciting the law according to chapter 20, article 24 of the general business law of New York; also containing a gray blank envelope dated -- Hartford, September 9, 1975 from the Travelers Insurance Co. containing New York State identification card for one Richard P. Lucas; also containing a copy of the New York State insurance identificatio card for Richard P. Lucas and a letter entitled "Dear Policyholder, here are your new insurance identification cards."; an agreement between Leland Sisson with Richard P. Lucas dated July 26, 1971, Gerald N. Jakobowitz, Counselor at Law, Walden; envelope dated September 11, 1975 from the General Motors Acceptance Corp. containing a thank you for your last payment to Richard P. Lucas also containing a retail installment contract, by your name Richard P. Lucas, describing a new 1973 9 cylinder Chevy crew cab for a 1972 Dodge sports van; letter dated September 11, 1975 to Richard P. Lucas from Charles Roskoski with a letter from Charles Roskoski to Richard P. Lucas dated September 10, 1975; white piece of paper via Cooper-Jarrett with half of 9/20/75 gross 14029.23, WH, 2,174.60; ST 701.40 via, $824.85 $828.68 was the F.I.C.A.; one driver's daily log book starting with 9/1/75 going to the date 10/1/75; one leather buckle type log book cover containing a travel map, North East, including New York, New England area; travel aid interstate map and directory cover; Sunoco New York map; an envelope of the C.J. Shuttle Service containing a color picture of a man; two pages of a poem headed "These men with broken hearts"; four Cooper-Jarrett road driver's daily round trip pay sheets, one for October 10 and one for October 9, and one for October 8 and one for October 4; sixteen Massachusetts Turnpike Authority charge trip authorizations; six New York State Thruway charge trip authorizations; six New York State Thruway charge trip authorizations; and a photo-static article headed "To our leway"; and a pocket of a leather

case is a blue piece of paper postage will be paid and a 50 cent piece, and a Franklin piece; also in the container is a shocking pink and red ballpoint red pen; and a log book of October 2, 1975, to October 10, 1975, Cooper-Jarrett; piece of green paper foil and miscellaneous pieces of paper foil wrappers and foil; an old raisen and a piece of stone; Holiday Inn matchbook, a matchbook folded up in a Kool pack; copy of Deliverance by James Dicky; an unidentifiable piece of something, paper, a letter of the State of Connecticut, Surrogate Court, third circuit of July 3, 1974;letter of the New York State Executive Department of Youth of October 6, 1975 to Carl Lucas; a Ford passenger invoice for serial #832128; an envelope from the New York State Executive Department of Youth, October 6, 1975 addressed to Mr. Carl Lucas; a blank form headed "Your child is allowed to make one call."; a pamphlet of the Division of Youth, Goshen Center, medical card, "I hereby give my permission, etc" clipping from newspaper, Monticello entries on the back, a picture of Jim Migli; seven wage payment envelopes of the First National Bank of Highland; a toothpick in a paper container; seventeen deposit slips on the First National Bank of Highland, New Paltz, New York; a memorial for a friend and relatives for Lloyd D. Graham, Sr.; a form of the Wright Employment Agency with the name Mark Green written on it; a paper napkin with red lines and zags written all over it; and some handwriting on it; envelope of the Orange County Department of Social Services addressed to Richard Graham, September 22, 1975, containing therein a brochure of public assistance programs and a letter of September 13, 1975, decision form, O.C.P.A. 132; a small piece of note paper writing on one side headed "Scott's Corners"; a piece of note paper with writing on it one side headed "Al Serv", a tape from an adding machine; 252717A, tape $20.30 on one side and headed telephone Comp.; a picture badge showing Santa Claus, a woman and a child; six postcard of the Holiday Inn, Dayton Beach, Florida; a pink lady's wallet containing a picture of a young man headed, written on the back to Iris, in the beginning; a picture of the Defendant,

Graham from a penny arcade machine, writte. on the back, husband and Richard, first year; a social security card number for Iris K. Graham and employment identification card of the Public Employment Service for Iris Graham, only date on it February 3, 1973; a student identification card, Newburgh Free Academy to Iris Gineis embedded in plastic; a picture of a man and a dog; identification card of Iris Graham, 63 Pierpoint Avenue, Newburgh the passenger registration to Iris K. Graham, expiring December 31, 1972; a picture of a little girl, postage size, another picture of another girl, torn, black and white picture, a picture of a young lady and what appears to be a money. Written on the back, Iris and Che Che, 1968; two postage size pictures -- four postage size pictures of young children in color; a picture of Christ in a plastic container; a billfold, another picture of Christ; a picture of brother at graduation; picture of a baby and a young girl Mary Molinski; picture of a young lady to Iris, words cannot describe; picture of a young man headed on the back partially cut up to Iris, "best of luck"; picture of Defendant Graham taken in a penny arcade machine. That's it. A Zerox list of numbers headed Lake Street, Extra, #5342384 and with some handwritten items on it; a receipt of Scott's Corners Service, September 25, 1975, $552; another deposit slip of the First National Bank of Highland, New Paltz, New York, blank; a receipt of the Holiday Inn of Daytona Beach, 260941 and a blue and white Bic pen, Mid-Valley Oil Co. written on the First National Bank of Highland receipt;

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 13 | Miscellaneous books, papers and otheritems from rear left floor of car consisting of: | 38, 38 |

book, Ferdinand by Monroe Muneo Lief; a Storytown coloring book; copy of Oui magazine for November, 1975; a copy of Playboy magazine for November, 1975; a Ginn basic reading, Fun with Tom and Better of Deborah Kilb; a blue sock and a child's

school paper, very light writing, and I see the words "the best of all" on it;

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 14 | Mirror removed from sun visor of car with fingerprint | 38, 89 |
| 15 | Scraping of dry oil from front bottom of car and scrapings of dirt from under car | 38, 88 |
| 16 | Miscellaneous papers, matchbooks and watch consisting of: | 39, 88-99 |

matchbooks, one thousand personalized address labels; Winston, all names of matchbooks; Shurfine, Veretti House, Gerrys Corner Inn; another Shurfine; Costa beverage, another Costa beverage, four Bic pens, name of a matchbock cover, Foodtown, the Pinast Food Markets; another Shurfine, another Costa beverage, Macke Food and Vending Services; another personalized note stationery; Cocoa Cola and Writewell Co; a Mickey Mouse watch; eighteen rectangular paper plates, empty; a Times Herald-Record of May 24, 1974; a bag headed Stationery, Holiday Inn, containing two envelopes blank and threepieces of blank Holiday Inn stationery; two personalized bath mats and one in paper and one in cardboard; another bag containing Holiday Inn stationery; a bag also saying Holiday Inn stationery with two evelopes, three pieces of paper; a Taggart Driving School matchbooks and a Winston Cigarett matchbook;

| Exhibit # | Description of Items | Described at R/A page |
|---|---|---|
| 17 | White rope | 39 |
| 18 | Book of matches from Holiday Inn, Ramsey | 39 |
| 19 | One expended round of 12 gauge shotgun ammunition | 39 |
| 20 | Car key, trunk lid, and entire car | 40, 105-106 |

| | | |
|---|---|---|
| 21 | License plates of the car | 40 |
| 22 | Rifle secured from trunk | 41 |
| 23 | Several rounds of shotgun shells from trunk | 41 |

THE COURT: It appears to me the truth and accuracy of a statement would have a bearing upon its voluntariness. (R/A 732)

THE COURT: I think the truthfulness and accuracy of his confession has a bearing upon its voluntariness. It certainly has to me. (R/A 733)

THE COURT: It's a matter of common experience and knowledge, Mr. Zager. If a man's words are twisted, and the details being given of some event, and if it's being done under some compulsion, that he might give details which are altogether different from the truth. If he is, on the other hand, making a voluntary statement of his own free will and without any violation of any of his constitutional rights, and in the desire to cooperate, there is a likelihood his statement would be more truthful. I think that the accuracy or truthfulness of a statement that is given has a bearing upon the issue as to whether or not it was voluntarily given. That is the only reason I'm taking it. (R/A 739)

THE COURT: I will overrule the objection on two grounds. ...secondly, it relates to the truthfulness of the confession. I believe it would have some bearing upon the issue which I have to decide, which is its voluntariness. (R/A 823)

THE COURT: The Court is saying, and I'm saying and I think I have said it very clearly, that the truthfulness of the confession would have a bearing. It's not determinative, not dispositive of the issue, but would have a relationship or bearing upon the question that the Court has to determine. (R/A 926)

No: 80-6397

In The

Supreme Court of the United States

October Term, 1980

RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RECEIVED
MAR 19 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioner, Richard Graham, asks leave to file the attached Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, without prepayment of cost and to proceed in forma Pauperis. The petitioner's affidavit is attached hereto.

Dated: March 16, 1981

STEPHEN L. OPPENHEIM
Attorney for Petitioner
15 Hamilton Avenue
Monticello, New York 12701
(914) 794-5641

No: 80-6397

In The

Supreme Court of the United States

October Term, 1980

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Petitioner,

-against-

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MAR 19 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Richard Graham, first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, cost, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the writ are true.

1. Are you presently employed?

   No, I was last employed in August, 1975 and the amount of my wages at that time was $ ____ per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividents, or other sources?

   No.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

Leave to proceed as a poor person was granted and counsel assigned to me at the trial court, the Sullivan County Court, and in the Appellate Court, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

RICHARD GRAHAM

Sworn to before me this

15th day of March, 1981.

Notary Public

CHRISTINE C. MATTOX
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN DUTCHESS COUNTY
# 4695121
COMMISSION EXPIRES MARCH 30 1981

Cert 8 pg 7 Summer list 3

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JUN 16 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1980

No. 80-6397

ORIGINAL COPY

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RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

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# FURTHER SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

---

STEPHEN L. OPPENHEIM
Attorney for Petitioner
P.O. Box 29
Monticello, New York 12701
(914) 794-7111

10

On June 1, 1981, this Court denied certiorari in Florida vs Busch, 80-1627.

In Busch vs Florida, 392 So.2d 272, the Court decided that this Court's decision in Payton applied retroactively, at least to cases pending in this Court at the time of the Payton decision.

The Florida Court rejected the "State's contention that Payton should not be given retrospective application." The Court held that the "Supreme Court would not have vacated earlier judgment in this case and remanded it here for further consideration in light of Payton if there had been no intention on its part that Payton be applied to this case." (Busch vs Florida, 392 So. 2d 272.)

Denial of certiorari in Busch has two immediate results: a) it makes the retrospective application of Payton the final law in Florida; and b) it creates a conflict between the States on a matter of constitutional law.

This conflict gives rise to a choice of law problems of constitutional dimension in this case. Petitioner's arrest and the ensuing search of his room were conducted in Florida by a combined force of New York and Florida police. Since the arrest was illegal in Florida, it should be declared illegal wherever petitioner may have been tried.

Any other rule leads to the anomaly that one state may authorize illegal conduct in another state, so long as the trial is held in the authorizing state. Among other things, such a rule violates the Full Faith and Credit Clause.

Denial of certiorari in Busch, when coupled with this and similar cases, creates a division among the states as to the

application of a constitutional principle. The issue is not solely of interest to petitioner but involves a general problem in which the application of the United States Constitution is not now uniform.

It is respectfully submitted that this division among the states is a further circumstance warranting granting certiorari herein; as is the reasoning of the Florida Court, if it accurately reflects this Court's intention in remanding this and related cases.

Respectfully submitted,

STEPHEN L. OPPENHEIM
Attorney for Petitioner
P.O. Box 29
Monticello, New York 12701
(914) 794-7111

Cert. D

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APR 23 1981
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1980

No. 80-6397

ORIGINAL COPY

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RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

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# BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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## STATUTES INVOLVED

Criminal Procedure Law of New York

Section 140.15 (4)
Section 120.80 (4)

In The

Supreme Court of the United States

October Term, 1980

No. 80-6397

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RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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## OPINIONS BELOW

This case was remanded to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department by Order of this Court dated May 12, 1980. Upon further consideration, the Appellate Division, Third Judicial Department, reaffirmed the defendant's conviction. The opinion can be found at 76 A.D. 2d 228, 431 N.Y.S. 2d 209. The original opinion of the Appellate Division, Third Department is reported at 69 A.D. 2d 544, 419 N.Y.S. 2d 290. The opinion of the Sullivan County

Court denying the Suppression motions of petitioner and the co-defendant RICHARD LUCAS is reported at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966.

## JURISDICTION

The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. Section 1257 (3).

## QUESTIONS PRESENTED

1. Why Payton v. New York, 445 U.S. ____, 100 S. Ct. 1371, 63 L.Ed. 2d 639 should not be applied retroactively.

2. On the facts, this case is clearly distinguishable from Payton v. New York.

3. Did the arrest of the petitioner comply with the Fourth Amendment of the United States Constitution standards of reasonableness?

4. The evidence seized upon the arrest of the petitioner in his motel room had independent sources as contemplated by Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

5. Did the Appellate Division, Third Department, correctly apply to the motel search the harmless error doctrine of People v. Crimmins, 36 N.Y. 2d 230 and Chapman v. California, 386 U.S. 18?

6. Did the Court properly determine the admissibility of the petitioner's confession under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution?

7. Did the Appellate Division, Third Department, properly determine the admissibility of evidence coming from the search warrant executed upon the co-defendant's automobile?

## FACTS

The facts of this case are set forth in great detail in the Trial Court's opinion which is located at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966 through 969 (1977). Additionally, the facts were further summarized by the Appellate Division, Third Department in their opinion at 69 A.D. 2d 544, 419 N.Y.S. 2d 290 through 292 (1979).

The petitioner sets forth a statement of the case and, without getting into great detail, some exceptions to that statement are in order. Taking them in the sequence that they appear in the petitioner's statement, they are as follows:

(1) The Trial Court and the Appellate Division, Third Department, found that the arresting officers believed at the time of their entry into the petitioner's motel room that an arrest warrant had in fact been issued in the State of New York. This fact was evidenced by the reception of teletype messages to the Florida authorities working with the New York State Police confirming that the arrest of the petitioner and his co-defendant should be made for the crimes of murder, kidnapping and robbery and this confirmation occurred on the evening prior to the arrest. (RA 13-23)

(2) The petitioner's statement implying that the police lacked information concerning the Doberman pinscher dog's whereabouts with respect to the motel room is incorrect. The evidence proved that the police earnestly believed that the Doberman pinscher dog was located within the motel rooms. This was evidenced by the testimony of one of the arresting officers wherein

he wrapped a towel around his arm prior to entry for his protection. These facts were credited by the Trial Court and the Appellate Division. (RA 213-214)

(3) The petitioner's contention that the evidence taken from the motel room was utilized against him in the taking of the confession is incorrect and not substantiated by the evidence found by the Trial Court. Only the petitioner testified to its use. The police officers that questioned the petitioner were not the ones doing the inventorying of the property and they testified that none of it was shown to the petitioner during any of the questioning procedures.

The petitioner has attached as Appendices "F" and "G" a purported list of the property recovered from the co-defendant's vehicle and the motel rooms after arrest. The list, as it is portrayed in the appendix, is extremely misleading since it is given completely out of context with respect to the manner in which the items were seized. The petitioner has gratuitously separated the items seized into individual papers and exhibits, tremendously inflating the actual number of items obtained. (For example, the police obtained the petitioner's wallet at the motel arrest. This wallet is reflected by a listing of each individual item found within it, rather then listing a single exhibit.)

## REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

### I

Payton v. New York should not be applied retroactively.

In determining whether a decision of the Supreme Court of the United States should be given retroactive effect, one must look to the guidelines as set forth in Stovall v. Denno, 388 U.S. 293. In that case, this Court set forth three basic criteria to be utilized in the question of retroactivity: (1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards.

When this case was remanded back to the New York State Appellate Division, Third Department, by Order of this Court to reconsider its findings in light of Payton v. New York, the Appellate Division had to determine the specific question of retroactivity. In People v. Graham, 76 A.D. 2d 228, 230-231, the Court stated as follows:

> "...the most important of these factors is the purpose to be served by the new constitutional rule..., and that purpose can only be discerned by a close examination of the rule to determine if the application of the same goes to the 'very integrity of the fact-finding process' (People v. Buia, 34 N.Y. 2d 529, 530; accord Stovall v. Denno, 388 U.S. 293, 298). Thus, the Court of Appeals has concluded that there is no sufficiently compelling reason for New York State to

> establish a time of application for newly promulgated constitutional rules different from that recognized by the Supreme Court (see People v. Buia, Supra, in which retroactivity of the rule of Chimel v. California, 395 U.S. 752 (narrowing the permissible scope of searches incident to arrest) was denied on the authority of Williams v. United States, 401 U.S. 646).
>
> We turn now to a determination of whether the newly promulgated constitutional rule affects the 'very integrity of the fact-finding process.' In view of how that guideline was applied by our Nation's highest court in Linkletter v. Walker (381 U.S. 618) wherein the exclusionary rule of Mapp v. Ohio (367 U.S. 643) was denied retroactive effect, as well as in Williams v. United States (Supra) and in Hill v. California (401 U.S. 797) where the rule of Chimel v. California (Supra) was held not to be retroactive, we are compelled to conclude that the subject rule, i.e., that, absent exigent circumstances, a warrantless entry for the purpose of a routine felony arrest is unconstitutional, is not so essential to the 'very integrity of the fact-finding process' that all past reliances upon existing statutory law should be negated so as to rehabilitate with innocence those who by their intentional acts seriously offended our penal statutes. Accordingly, we decline to apply Payton retroactively and adhere to our original decision."

The New York State Appellate Divisions for the First and Second Departments have reached similar conclusions with respect to the retroactivity question. All of the Courts were in agreement that it could not be stated that the major purpose of the new constitutional doctrine was promulgated to overcome an aspect of criminal trials that would substantially impair their truth-finding function. (See People v. Benitez, 76 A.D. 2d 196.)

The conclusions reached by the Courts above are well-founded and are a logical approach considering the nature of the rule enunciated by the Supreme Court. On October 19, 1975 when the police arrested this defendant, they did so based upon probable cause, the belief that he was within his motel room, under exigent circumstances for noticeless entry and in the good-faith belief that a warrant existed. Recognizing that this arrest was "warrantless", it was performed by the police upon the reliance on the validity of a New York statute at the time the arrest was effectuated. This statute permitted warrantless as well as a noticeless entry. (Criminal Procedure Law 140.15 (4) and 120.80 (4).)

The Courts have already recognized that the police should not be held as blameworthy when they conform their conduct to the prevailing constitutional and statutory norm. Considering the purpose of the exclusionary rule, i.e., to deter unlawful police conduct, then evidence should only be suppressed if it can be said that the police officers had knowledge, or are properly chargeable with knowledge, that their search was unconstitutional under the Fourth Amendment (see United States v. Peltier, 422 U.S. 531). As noted by the Court in Payton, approxi- twenty-four states permitted a warrantless entry into the home for the purpose of effectuating an arrest in the absence of exigent circumstances. Since the thrust of the Court's decision will be given effect through the exclusionary rule, its purpose was to correct a flaw in criminal procedure, not of the magnitude that deprives a defendant of his fundamental rights to a fair trial. Payton, therefore, should not be held retroactive, invalidating this defendant's arrest.

II

This case is clearly distinguishable on the facts from Payton v. New York.

The facts in Payton v. New York, 45 U.S. ____, 100 S. Ct. 1371, 63 L.Ed. 2d ____, are clearly distinguishable from the case at bar. In Payton, the police entered the defendant's apartment for the purpose of effectuating an arrest based upon probable cause, but without knowledge of the defendant's presence in his apartment. The entry by the police was without an arrest warrant and was forceably made. In Riddick, the police made a warrantless arrest in 1973 for an armed robbery that had occurred in 1971. This arrest took place in the defendant's house and, unlike Payton, there was limited notice of the police presence.

In Graham, when the police entered the motel room, they knew that he was present, they had probable cause to effectuate the arrest, they were aware of the charges, they believed the defendant to be armed, they knew of the existence of a vicious dog and took precautions for it, they believed that their own safety was in issue and, most important, they believed that a valid arrest warrant existed.

The facts demonstrate that the lack of an arrest warrant here was more technical than procedural and not by voluntary choice on the part of the police. There was nothing more that the police could have done in effectuating the defendant's arrest in terms of the Fourth Amendment and the arrest warrant requirement.

This Court in Payton, Supra, at Page _____ held that

the Fourth Amendment:

> "...prohibits the police from making a warrantless and nonconsentual entry into a suspect's home in order to make a routine felony arrest."

Implicit in the Payton decision and as stated by the Court at Page _____:

> "The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant, and we will do the same."

The unique fact situation that exists in Graham takes this out of the context of a "routine felony arrest". The appellant does not argue or attempt to prove that the arrest here was routine. The very issues that he raises clearly demonstrates and supports the respondent's position that it was anything but routine. The police here determined that probable cause existed, and they needed an arrest warrant from New York. They requested this warrant well in advance of the arrest and they waited for it and received confirmation of its existence. This confirmation came by way of two teletype messages from New York, upon which the police officers could rely and believe that the arrest warrant in fact existed.

This is not a case of police error in judgment or intentional disregard of existing law to accommodate their needs. When one analyzes the choices available, and the decisions made by the police, it exemplifies the highest qualities of professional law enforcement. There is no police conduct here that need be deterred.

III

The petitioner's arrest was not violative of the Fourth Amendment standards of reasonableness.

The defendant's arrest in his motel room was proper, regardless of the warrant issue because it was based upon probable cause and in the presence of exigent circumstances. Nothing in the Payton decision excludes the justification of a warrantless entry into a home for the purpose of effectuating an arrest based upon probable cause and exigent circumstances when the arrest is not "routine". The affirmance of the petitioner's convictions by the New York State Appellate Division, Third Department, and the lack of review by the New York State Court of Appeals indicates that their decision is in conformity with the New York State, Federal and Constitutional standards.

In Ker v. California, 374 U.S. 23, 31 the Court made it clear that their prior decisions were not to be construed as an:

> "...assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U.S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law."

The Court went on to state at Page 34 that:

> "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain".

In Ker v. California, Supra, the Court upheld an arrest performed in almost the identical fashion as was done in this case.

It was an arrest effectuated pursuant to State statutes allowing noticeless entry upon exigent circumstances through the use of a passkey. Additionally, the arrest was made without a warrant, although based upon a finding of probable cause. The Court held that the arrest sanctioned by California law was:

> "...not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment. (See Page 41)".

The petitioner herein initially seeks to have this Court review the facts in order to determine that probable cause was lacking. There is no question that this Court has that power, provided there are contradictory factual questions that require its determination with respect to whether the lower court's decision as to the constitutional standard of reasonableness has been respected.

The most oft cited definition of probable cause comes from Brinegar v. United States, 338 U.S. 160, 175-176 (1949) wherein the Court stated:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt."... And this "means less than evidence which would justify condemnation" or conviction.... Since Marshall's time, at any rate, it has come to mean more than bare suspicion; probable cause exists where "the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the "belief that" an offense has been or is being committed...."

The Trial Court resolved the factual question that probable cause existed (utilizing the above definition) and the Appellate Division, Third Department, concurred.

The petitioner's contention that the New York Courts applied the wrong standard, that is, a "reasonable suspicion" standard rather than "probable cause", is not substantiated by the record. The Court's ruling on "probable cause" was based upon the constitutional standards as enunciated by this Court.

Since the lawfulness of any arrest without a warrant must in the first instance be based upon probable cause, the findings of the Court below are not in conflict. This determination does not end the petitioner's allegations with respect to the propriety of the arrest. The arrest proceedings occurred in the motel room of the petitioner, based upon a noticeless entry. The petitioner seeks to have this Court define the limits or the exceptions which would justify a noticeless entry. Such a determination on the facts in this case is not required.[1]

Although the Court did not specifically address the issue of exigent circumstances and more particularly as to what facts would constitute such, they did cite with approval the cases of Dorman v. United States, 435 F. 2d 385 (1969) and United States v. Reed, 572 F. 2d 412 (CA 2 1978) cert denied 439 U.S. 913. The most extensive discussion in this area can be found in Reed, Supra, and there the issue to be decided was:

> "...whether and under what circumstances the Fourth Amendment permits federal law enforcement officers to enter a suspect's home in order to effect a felony arrest for which the officers have both statutory authority and probable cause but no warrant." (See 572 F. 2d at P. 417)

The Court therein recognized that the Supreme Court has not spoken directly on that issue. After lengthy analysis, the

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1 The arresting officers in this case believed that at the time of their entry into the motel room to effectuate the arrest the New York State Police authorities had obtained an arrest warrant as requested the night before.

Court concluded that in the presence of exigent circumstances, such an arrest was constitutional. In the Court's determination as to whether exigent circumstances exist, they adopted the criteria enumerated in Dorman, Supra, wherein the following was set forth in Reed, Supra, Page 424:

> "These include (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause...to believe that the suspect committed the crime; (4) a strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry."

In Dorman, Supra, the Court also listed as another consideration, the time of entry.

Focusing solely on the issue of exigent circumstances, it is clear that the arrest of this defendant, if considered warrantless, was based upon the above-listed and accepted exigent circumstance criteria.[2]

The police knew that Craig Mitton was murdered after being shot three times by a small caliber weapon. They knew the connection between the deceased's employment and the defendant Graham. They further knew the connection of Lucas with the deceased's employment, his motive and need for money, his violent criminal history, his prior attempt a week earlier to break into the Middle Hope gas station belonging to Mid-Valley Petroleum Corp., his presence at the bank at the same time that the deceased was to have appeared for his night deposit, Lucas'

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2 United States v. Reed, Supra, Footnote 7 at P. 421 indicates that their decision is in accordance with the Sixth, Ninth and District of Columbia Circuits. See also United States v. Williams, 604 F. 2d 1102 (1979( where the exigent circumstances of Dorman, Supra, were utilized in the Eighth Circuit.

relationship with Graham, their immediate flight within two to three hours of the murder from New York to New Jersey and then to Florida, the lack of preparation as evidenced by the female companions' haste in leaving without knowing their destination and Graham's false identity in the Florida motel. These factors, coupled with the reasonable belief that they were still armed after having committed the most violent of felonies, together with the earnest belief that they were in the custody of a Doberman pinscher dog, a known vicious-type animal, requiring one of the arresting officers to wrap a towel around his arm prior to entry, all emphasized the reasonableness of the police conduct in the arrest of this defendant.

The Trial Court and Appellate Division found the existence of exigent circumstances permitting the noticeless and warrantless arrest and implicit in that finding, and the subsequent affirmance of the Graham case after its remand from the Supreme Court of the United States, is the fact that this was not a "routine felony arrest". The same circumstances that permitted the warrantless arrest also permitted the noticeless entry. Since they were performed simultaneously and upon the same facts, there is no logical reason to give them separate consideration.

The continuous and intensive investigation and police pursuit commencing on October 15, 1975 at the Brookhaven Bungalow Colony, Roosa Gap Road, Bloomingburg, New York, culminating at the Dania Travel Lodge Motel in Florida on October 19, 1975 at 8:00 a.m. represented strong and swift police action for the most violent of crimes; action that was predicated upon probable

cause, reasonable information and good-faith belief resulting in the apprehension of dangerous killers and taking them into custody. The confrontation and apprehension of these defendants could have been potentially much more dangerous and violent with a greater risk for escape or endangerment of life or safety of one of the officers or the defendants had this arrest occurred in any other fashion.

As stated by the Court in Dorman v. United States, Supra, and reiterated in Brooks v. United States, 20 Cr.L. 2267, 2268, the Court of Appeals of the District of Columbia:

> "The exigent circumstances doctrine is applied to the facts as perceived by the police at the time of entry, not as subsequently uncovered."

Based upon the facts as they existed in the case at bar, the police action on the notice and arrest was exactly as what was contemplated in United States v. Reed, Supra.

IV

The evidence obtained from the motel subsequent to the petitioner's arrest did not contribute to the petitioner's conviction.

The Appellate Division, Third Department's decision indicated that the search of the motel may have been overbroad under the guidelines established in Chimel v. California, 395 U.S. 752. The Court found that the evidence against the petitioner was so overwhelming that the items admitted at trial from the motel, if they be in error, were harmless under People v. Crimmins, 36 N.Y. 2d 230.

The petitioner's contention that the Appellate Division justified the search on the basis of the confession does not have support under the facts of this case. The Court's determination was clearly an evaluation of the total evidence presented against the petitioner in light of the items received from the motel. It concluded that there was no constitutional error as enunciated in Chapman v. California, 386 U.S. 18 because there was no reasonable possibility the error might have contributed to the petitioner's conviction and it was, therefore, harmless beyond a reasonable doubt.

If a search is improper, it can only have contributed to a defendant's conviction if the proceeds of the search are utilized at the trial. An overbroad search where the items obtained are not utilized at trial certainly cannot contribute to a conviction unless additional evidence obtained can be found to be the "fruits of the poisonous tree". In the instant matter only five items of evidence were produced at trial stemming from the motel search, and the first of such items introduced was done so by the defense. Additionally, each of those items had an independent source known to the police prior to their seizure, and this was established at the pre-trial suppression hearings. These independent sources are consistent with prior holdings of this Court as exemplified in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Nor can credence be given to the petitioner's allegations that had it not been for the motel search there would not be a confession, therefore, they are all "fruits of the poisonous tree" as enunciated in Wong Sun v. United States, 371 U.S. 471.

The defendant was lawfully arrested and taken into custody by the police prior to the inventory of his motel room. His lengthy confession was a product of that lawful arrest totally disconnected in time and place from any of the items gathered by the police from the motel.

The Appellate Division's determination with respect to the lawful arrest, the motel search, the overwhelming proof against the defendant once his lawfully-obtained confession was admitted into evidence, and the harmless error doctrine is consistent with New York Law, the Fourth Amendment of the United States Constitution and the Supreme Court cases interpreting these issues.

V

The Trial Court's ruling of the admissibility of the petitioner's confession was not in conflict with the constitutional guidelines.

The petitioner attempts to assert that the Trial Court determined that the confession was voluntary based upon the sole consideration of its truthfulness. This is an inaccurate account of the testimony introduced at the pre-trial suppression hearings and of the Trial Court's findings.

The Trial Court found in the first instance that the confession was voluntary under the constitutional protections of the Fifth and Fourteenth Amendments as being freely and voluntarily made. This aspect was gone into in depth at the hearing as it was proven that the defendant's contention of a coerced confession was not credible. The Trial Court found that

this confession was not the product of any overreaching or mistreatment by the police.

The Court also determined that the confession did not violate the principles set forth in Miranda v. Arizona, 384 U.S. 436 since the defendant was adequately apprised of his constitutional rights several times prior to his confession, and those rights were preserved both in writing and on a tape recording.

Additionally, the Court determined that the arrest was lawful and that the confession was not the fruits of illegal police conduct. The court specifically reviewed Brown v. Illinois, 422 U.S. 590 finding that this arrest was not investigatory, but based upon probable cause and for the purpose of prosecution.

The standard of truthfulness as complained by the petitioner herein was not the criteria utilized for admissibility. The Court considered truthfulness only with regard to the defendant's contradictory testimony at the suppression hearing when he alleged that the police coerced his confession. (RA 338-339). Nothing in that finding violates the principles as stated in Rogers v. Richmond, 365 U.S. 534, 544 where the Court stated that:

> "The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined ...."

This was clearly the focal point of the trial judge here.

VI

The search of the Lincoln Automobile was not in violation of the Fourth Amendment.

The petitioner contends here, as he did before the New York State Appellate Division, Third Department, that the second entry into the Lincoln automobile was a warrantless search in violation of the Fourth Amendment protections.

Initially, the police obtained a search warrant and pursuant thereto, searched the Lincoln Continental on October 17, 1975. Thereafter, on October 20, 1975, the vehicle was again dusted for additional fingerprint evidence based upon information stemming from the defendant's confession. In that second inspection four fingerprints were developed on the inside portion of the trunk lid which were later positively identified as belonging to the victim of the homicide.

The search warrant provided for the search of fingerprint evidence from the automobile and the return of the search warrant indicated, as one of the items of property seized, the automobile itself. Additionally, immediately before and after the search, the vehicle was kept under constant surveillance by members of the New York State Police through the second inspection and even after the arrest.

In effect, the automobile was seized by the police on October 17, 1975, as evidence of the homicide pursuant to a valid and lawful search warrant. As part of the probable cause for the warrant and the reasonable inferences that flowed from the facts, the police could reasonably infer that the automobile

was used in some manner in the commission of these crimes. The police certainly have the right to inspect and examine evidence that is already seized and within their control in a manner that is convenient and suitable for the purpose of their investigation. Whether these items of evidence are examined once or numerous times does not in any invalidate the already lawful seizure and only the legality of the initial seizure is in question, and that has already been ruled as proper.

This fact situation is clearly distinguishable from Mincey v. Arizona, ____ U.S. ____ 98 S.Ct. 2408 (1978) where the police conducted an exhaustive four-day warrantless search of the apartment where the defendant was arrested under the guise of a "murder scene exception". The Fourth Amendment here was fully complied with by a neutral magistrate issuing a proper warrant and pursuant thereto, evidence was seized. Its subsequent reinspection for additional information is not a second entry that can be viewed as a warrantless search as alleged by the petitioner.

## CONCLUSION

For the reasons stated herein, the petition for Writ of Certiorari should be denied, in all respects.

Dated: Liberty, New York
April 21, 1981

Respectfully Submitted,

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In The

Supreme Court of the United States

October Term, 1980

No. 80-6397

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RICHARD GRAHAM,

Petitioner,

ORIGINAL COPY

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

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REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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Payton vs New York, 45 U.S. ____, 100 S. Ct. 1371, does not state a new constitutional principle.

Point II ---------- 3

The search in this matter has already been held unconstitutional in People vs Lucas, ____N.Y.2d ___, ____N.Y.S.2d ____, decided March 26, 1981.

Point III ---------- 5

This case is not distinguishable from Payton vs New York.

Point IV ---------- 7

There has been no finding of exigent circumstances to justify a warrantless search.

Point V ---------- 9

The Respondents acknowledge that the Lincoln was searched a second time based on Petitioner's confession.

Conclusion ---------- 9

Exhibit A ---------- 10

CASES CITED


| | |
|---|---|
| Agnello vs United States, 269 U.S. 20 | 1 |
| Coolidge vs New Hampshire, 403 U.S. 443 | 1 |
| Johnson vs United States, 333 U.S. 10 | 1 |
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POINT I

Payton vs New York, 45 U.S. ___, 100 S. Ct. 1371, does not state a new constitutional principle.

Respondents and the Courts of New York State which have refused to apply Payton vs New York, 45 U.S. ____, 100 S. Ct. 1371, to appeals pending at the time of the Payton decision do so on the basis that Payton states a "new constitutional doctrine." (Respondents' Brief, p. 2).

It is respectfully submitted that Payton does not state a new constitutional decision. Rather, Payton iterates an unbroken requirement for a warrant or exigent circumstances to enter a citizen's home.

In its recent decision in Steagald vs United States, _____ U.S. ____, _____ S. Ct. ____, 29 Cr.L. 3007, decided April 21, 1981, this Court coupled Payton with Johnson vs United States, 333 U.S. 10, decided 22 years earlier:

> The search at issue here took place in the absence of consent or exigent circumstances. Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. See Payton vs New York, 445 U.S. 573 (1980); Johnson vs United States, 333 U.S. 10, 13-15. (1948). (Steagald vs United States, supra, ___U.S. at ____, 28 CrL at 3009.) (Emphasis supplied.)

Immediately thereafter this Court coupled Payton with cases covering 55 years:

> Thus, as we have recently observed, "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Payton v. New York, supra, at 590. See Coolidge v. New Hampshire, 403 U.S. 443, 474-475, 477-478 (1971); Jones v. United States, 357 U.S. 493, 497-498, (1958); Agnello vs United States, 269 U.S. 20, 32-33 (1925). (Steagald vs United States, supra, ____ U.S. at ___, 28 CrL at 3009.)

Petitioner has urged from the very first that the entry into his room and his subsequent arrest were illegal under existing principles of constitutional law. His position was confirmed in Payton.

Payton announced new law only to the extent that it rejected a new constitutional reading by the New York Court of Appeals. In terms of continuing principle, Payton did not announce new law.

Therefore, the principles stated in Payton should be applied herein. The imperatives that led this Court to reverse Petitioner's conviction once require reversal again.

POINT II

The search in this matter has already been held unconstitutional in People vs Lucas, ____N.Y.2d ____, ____N.Y.S.2d ____, decided March 26, 1981.

Petitioner and Richard Lucas, his alleged co-conspirator, were arrested in adjoining motel rooms at exactly the same moment, under exactly the same circumstances.

A single, consolidated suppression hearing was held. The Trial Court and the Appellate Division upheld the search in both cases.

The New York Court of Appeals has now held that the search was unconstitutional and has reversed Lucas' conviction:

> The trial court also erred in refusing to suppress certain items of physical evidence which were seized from defendant's Florida motel room immediately after his arrest. The seized items included: a brown briefcase purportedly owned by Graham, a black briefcase purportedly owned by defendant, a safe deposit box key for a box registered in defendant's name, receipts for American Express Travelers' Checks issued to defendant, a card showing defendant's and Graham's addresses and several Western Union receipts for money orders allegedly sent by defendant to friends in New York. As the People have candidly conceded, the warrantless search of defendant's motel room was "overbroad", extending far beyond the permissible scope of a search incident to a lawful arrest (see Chimel v California, 395 US 752). Hence, the evidence seized during the course of the search must be suppressed. We note, however, that any information related to the suppressed physical evidence which the police legitimately obtained through independent sources may be used in evidence against defendant if the People decide to retry him on the remaining murder count. (People vs Lucas, supra, pp. 3-4 of slip decision attached hereto as Exhibit A.)

There is no constitutional justification for a State to apply opposite interpretations of law to the same set of facts to the advantage of one defendant and disadvantage of another.

This is not a case of different verdicts at different trials or of disparate sentences for the same crime. This is a case where courts sitting on the same record have held the same search constitutional as to one defendant and unconstitutional as to another,

without a single distinguishing fact. Such holdings deny this Petitioner both due process and equal protection under the Fourteenth Amendment.

## POINT III

### This case is not distinguishable from Payton vs New York.

Before this Court's decision reversing Payton, Respondents successfully argued below and in People vs Lucas that this case and Payton are indistinguishable. They were correct.

The issue is exactly the same: may the police enter a house to effect an arrest, without a warrant, without consent, and without exigent circumstances?

Respondents argue that the "lack of an arrest warrant here was more technical than procedural and not by voluntary choice on the part of the police. There was nothing more that the police could have done..." (Respondents' Brief, p. 4):

> The police could have done the very thing the Constitution requires of them: They could have obtained a warrant.

Sight should not be lost of the fact that no attempt was made to get a warrant in either Florida or New York. In neither state was any approach made to any judge.

The Respondents' attempt to isolate the police at the motel from the totality of police conduct. Respondents would have the request by the New York police in Florida to the New York police in New York become the equivalent of an application to a magistrate. However, the police talking to the police is not the constitutional equivalent of an application for a warrant to a magistrate.

The teletype relied on by the People does not state that a warrant had been issued; in any event, no warrant had in fact been issued; therefore, Respondents cannot rely on any warrant.

By implication or by direct communication, the teletype conveyed untrue information; it was, therefore, a nullity:

> Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. (Whiteley vs Warden, 401 U.S. 560, 568.)

The teletype merely represented the police talking to themselves instead of to a magistrate.

## POINT IV

There has been no finding of exigent circumstances to justify a warrantless search.

At page 10 of their brief Respondents claim that the "Trial Court and Appellate Division found the existence of exigent circumstances permitting the noticeless and warrantless arrest." This statement is not supported by the record.

Neither Court found exigent circumstances justifying a warrantless arrest.

The Courts below only found exigent circumstances to justify a noticeless entry.

The Respondents are more accurate at page 8 of their brief where they state:

> ...the Court did not specifically address the issue of exigent circumstances and more particularly as to what facts would constitute such,...

Had the Courts below found exigent circumstances, it would have been able to affirm Petitioner's conviction within the framework of Payton. Rather, on remand, the Appellate Division affirmed on the basis of the non-retroactivity of Payton.

There has been no finding of exigent circumstances to justify a warrantless arrest; therefore, Petitioner's conviction should be reversed on the basis of Payton.

## POINT V

### The Respondents acknowledge that the Lincoln was searched a second time based on Petitioner's confession.

At page 15 of their brief, Respondents acknowledge that the Lincoln "was again dusted for additional fingerprint evidence based upon information stemming from the defendant's confession."

Therefore, the fingerprints are the fruit of Petitioner's confession which is the fruit both of the illegal search and the illegal arrest. Therefore, the fingerprints should be suppressed.

## CONCLUSION

It is respectfully urged that Petitioner's application for a writ of certiorari should be granted.

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# State of New York
# Court of Appeals

3 No. 108
The People &c.,
Respondent-Appellant,
v.
Richard P. Lucas,
Appellant-Respondent.

## MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(103)Carl J. Silverstein,Sullivan County Legal Aid, for appellant.
Joseph Jaffe,DA,Sullivan County(Stephen F. Lungen of counsel) for respondent.
Robert Abrams,Attorney-General(Shirley Adelson Siegel & Frederick R Walsh of counsel) Purs.to Exec. Law §71.

MEMORANDUM:

Insofar as appealed from by defendant, the order of the Appellate Division should be reversed, the statements made by defendant on the airplane and the physical evidence seized in the motel room suppressed and the case remitted for further proceedings on the indictment. The cross-appeal taken by the People should be dismissed.

Following a jury trial, defendant was convicted of murder in the second degree, kidnapping in the first degree and robbery in the first degree. The Appellate Division modified the judgment, on the law and the facts, by dismissing the kidnapping and robbery counts. We conclude that the remaining conviction for murder in the second degree must be reversed, because the trial court erroneously permitted the introduction of certain illegally obtained evidence.

One of the more damaging items of evidence introduced at the trial was an uncounseled, inculpatory statement made by defendant while he was being transported from Florida to New York following an extradition proceeding. By the time the statement was made, a warrant for defendant's arrest on this charge had been issued by a magistrate in New York. Moreover, it is undisputed that defendant was in custody at the time he made the statement and that he had previously requested the assistance of an attorney. Hence, defendant's "indelible" right to counsel had attached and any waiver of that right made in the absence of counsel would have to be deemed invalid (People v Samuels, 49 NY2d 218; People v Cunningham, 49 NY2d 203; see People v Settles, 46 NY2d 154). Nevertheless, the courts below concluded that the uncounseled statement in question need not be suppressed, since, in their view, it was made "voluntarily" and "spontaneously" (see People v Kaye, 25 NY2d 139). This conclusion, however, is simply not supported by the record.

According to the credited testimony of Officer Reidy, who was present when the statement was made, defendant initiated the conversation by asking the officer whether it was permissible to discuss the case. The officer replied in the affirmative, but reminded defendant that any statements he made could be used against him at trial. Defendant, in turn, acknowledged this admonition, but indicated that he wished to ask some questions about the pending charges. He then proceeded to ask Officer Reidy about the status of his case. Officer Reidy replied by informing him that the District Attorney had already obtained a 14-page statement from his alleged accomplice, Richard Graham, in which Graham

acknowledged his own participation in the underlying robbery, but accused defendant of having been the sole perpetrator of the murder. Defendant responded immediately, stating: "Well, I would like to talk to soembody about this. I might have been involved, but I didn't do--I didn't kill anybody".

This statement cannot be considered "spontaneous" under any view of the facts, since it was not a blurted-out admission, but was instead the product of an "extended discussion" between defendant and the police officer (People v Cunningham, supra, at p 210 n2). It is not of controlling significance that the statement was "volunteered" in the sense that it was not made in response to direct interrogation, for, as we have previously observed, "the spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (People v Maerling, 46 NY2d 289, 302-303). Here, there can be no doubt that the police officer, by engaging in the discussion with defendant concerning the crime with which he was charged and by informing defendant of his alleged accomplice's statement, evoked the uncounseled, inculpatory statement from the defendant. Accordingly, the statement made by defendant should have been suppressed.

The trial court also erred in refusing to suppress certain items of physical evidence which were seized from defendant's Florida motel room immediately after his arrest. The seized items included: a brown briefcase purportedly owned by Graham, a black briefcase purportedly owned by defendant, a safe deposit box key for a box registered in defendant's name, receipts for American Express Travelers' Checks issued to defendant, a card showing defendant's and Graham's addresses

and several Western Union receipts for money orders allegedly sent by defendant to friends in New York. As the People have candidly conceded, the warrantless search of defendant's motel room was "overbroad", extending far beyond the permissible scope of a search incident to a lawful arrest (see Chimel v California, 395 US 752). Hence, the evidence seized during the course of the search must be suppressed.* We note, however, that any information related to the suppressed physical evidence which the police legitimately obtained through independent sources may be used in evidence against defendant if the People decide to retry him on the remaining murder count.

Inasmuch as we have concluded that there must be a new trial because of the erroneous suppression rulings discussed above, we find it unnecessary to consider the numerous claims made by defendant concerning a variety of supposed trial error. It should be noted, however, that we find no merit to defendant's contention that the entire indictment should have been dismissed at the close of the trial for lack of legally sufficient evidence. Nor can we agree that the indictment should have been dismissed on the ground that defendant was denied his constitutional right to a speedy trial, since,as the courts below found, the delays in the proceedings were attributable, for the most part, to defendant's own actions.

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*We reject defendant's additional argument that two safe deposit box keys for a box registered in Graham's name should have been suppressed. These keys were taken directly from a purse owned by Roberta Holmes, a friend who had accompanied the two men on their sojourn to Florida. Since Holmes was carrying the purse on her person at the time it was searched by the police officers, defendant has no standing to challenge the legality of the search; inasmuch as the safe deposit box in question was registered in Graham's name and there is no showing that Lucas had any legal interest therein, he has no standing to challenge the seizure (cf United States v Lisk, 522 F2d 228, cert den 423 US 1078).

Finally, we hold that the People's cross-appeal from so much of the Appellate Division order as dismissed the kidnapping and robbery counts must be dismissed. The order from which the People appeal recites that the modification was made "on the law and the facts", and an examination of the Appellate Division opinion indicates that the recitation in the order is accurate. Thus, we have no power to entertain the People's appeal (CPL 450.90 [subd 2, par a]).

JASEN, J. (concurring):

I agree with the majority that defendant's inculpatory statement to Officer Reidy was not "spontaneous" as a matter of law. I disagree, however, with the standard employed by the majority in reaching this conclusion and, therefore, am unable to join in their opinion.

The majority, adopting language used by this court in People v Maerling (46 NY2d 289, 302-303), states that spontaneity must "be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed." While I have no quarrel with this general proposition, I do not believe that it states the appropriate standard to be applied in determining whether or not a statement was truly spontaneous. In my view, the quoted language from People v Maerling was meant merely to illustrate instances of non-spontaneous declarations and was not intended to be a pronouncement of the legal test to be utilized by a suppression court confronted with the task of determining whether a statement was spontaneous when made.

More recently, in People v Lynes (49 NY2d 286), this court had the opportunity again to address the question whether an uncounseled statement was truly spontaneous. In Lynes, we stated that the test to be employed by a suppression court in such situations is "whether the defendant's statement can be said to have been triggered by police conduct which should reasonably have been anticipated to evoke a declaration

from the defendant." (People v Lynes, supra, at p 295.) Rather than attempting to pigeonhole defendant's statement into one of the categories delineated in People v Maerling, the present case should be measured under the more appropriate Lynes standard.

Applying the test in People v Lynes, there can be no doubt that defendant's inculpatory statement was not spontaneous. Indeed, it was only after the extended discussion between Officer Reidy and defendant, in which Reidy informed defendant of the current status of the charges pending against him and of his alleged accomplice's statement, that defendant came forth with the inculpatory statement. Under any view of the facts, defendant's statement can only have been the result of this ongoing conversation with Officer Reidy "which should reasonably have been anticipated to evoke a declaration from the defendant." (People v Lynes, supra.) Thus, as a matter of law, this uncounseled statement was not spontaneous and should have been suppressed.

* * * * * * * * * * * * * * *

On defendant's appeal: Order reversed, statements made by defendant on the airplane and physical evidence seized in the motel room suppressed and the case remitted to Sullivan County Court for further proceedings on the indictment.

On People's appeal: Appeal dismissed.

Memorandum.
All concur, Jasen, J., in a concurring opinion.

Decided March 26, 1981

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. LAWRENCE H. COOKE, Chief Judge

- - - - - - - - - - - - - - - - - - - - - - - - - -X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RICHARD B. GRAHAM,

Appellant.

- - - - - - - - - - - - - - - - - - - - - - - - - -X.

CERTIFICATE DENYING APPLICATION FOR RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

I, LAWRENCE H. COOKE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that I have considered and hereby deny the application of the above-named appellant for reconsideration of my Certificate Denying Leave herein, dated December 26, 1980.*

Dated at Monticello, New York

May 29, 1981

Lawrence H. Cooke,

Chief Judge

*Description of Order: Order of the Appellate Division, Third Department entered August 13, 1980, modifying, on the law and the facts, the judgment of the County Court, County of Sullivan, rendered November 3, 1977, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and as so modified, affirming said judgment by convicting defendant of two counts of murder in the second degree.

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RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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By: STEPHEN F. LUNGEN
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10

The petitioner's supplemental briefs failed to raise any constitutional arguments that would cause any different result other than denying their petition for writ of certiorari. Notwithstanding the case of Busch v. Florida, 392 So. 2d 272 (Cert den. June 1, 1981) their writ does not raise a choice of law problem of constitutional dimension nor does this case require the granting of the writ based upon a conflict between the states with respect to the retroactive application of Payton v. New York, 45 U.S. ___ 100 S. Ct. 1371.

The unique factual setting of petitioner's arrest permits this Court to decide and deny the instant writ without having to pass upon the above-mentioned questions. The prohibitions of the police making warrantless and non-consentual entries into a suspect's home was confined to routine felony arrests, not as to all arrests. There is nothing within the facts of this action that can lead one to the conclusion that it was routine. Therefore, regardless of this Court's decision in Payton v. New York, the arrest of this defendant would still be proper and has been so held by the Courts in New York as recently as May 29, 1981 when Chief Judge Lawrence H. Cooke denied the petitioner's application for reconsideration with respect to his application for leave to appeal. A copy of this certificate is attached hereto and made a part hereof.

With respect to the choice of law question raised by the petitioner, the procedural aspects of the arrest are governed by the law of the state in which there is trial jurisdiction. The procedural guidelines of the State of New York concerning the admissibility of evidence govern and were properly applied by all of the Courts in this state. With

respect to those procedures and giving consideration to the constitutional aspects of them, the arrest here was ruled to be lawful both prior to and subsequent to the Payton decision, and there is nothing contained within that decision that should be changed.

The Petitioner's allegation that this case should be reversed upon the basis that the Court of Appeals of the State of New York reversed the companion case of People v. Lucas is not justified. This is not a situation where the New York Court of Appeals is applying opposite interpretations of law to the same set of facts as alleged herein. The Lucas case was reversed based upon certain New York decisions which have dealt with the indelible right to counsel and particularly because a statement of the defendant was introduced in evidence after the Court of Appeals determined that this right to counsel attached. Upon reversing the case and returning it to the County Court, County of Sullivan, State of New York, for a re-trial, the Court also noted that certain items of physical evidence should have been suppressed based upon an overbroad search at the motel in Florida. The Court decided that five (5) physical items of evidence must be suppressed, but that the information leading to these items would be admissible.

The search question at the motel was dealt with extensively in both the Graham case, as well as Lucas, and even at the Appellate Division stage in New York, the Court found the search to be overbroad, but that the evidence admitted at trial was deemed to be harmless error. The Court of Appeals

did not hold the admission of evidence from the motel search in Lucas to be reversible error in and of itself. It is clear by the decision which is annexed to the Petitioner's reply and supplemental brief, that the basis for reversal was the statement and not the search.

It is respectfully submitted that, for the reasons stated herein and upon the original brief in opposition, the petition for writ of certiorari should be denied in all respects.

Dated: Liberty, New York
June 23, 1981

Respectfully submitted,

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